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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 682

J. STEVE ANDERSON, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 683

L. H. PRICHARD, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 30, 1940.

CERTIORARI GRANTED MARCH 4, 1940.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 12, 1940.
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[fol. a] [Caption omitted]

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 86968

J. STEVE ANDERSON, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances: For Petitioner: Charles H. Garnett, Esq., For Respondent: Charles P. Reilly, Esq.

DOCKET ENTRIES

1936.

Oct. 19. Petition received and filed. Taxpayer notified. (Fee paid).

Oct. 20. Copy of petition served on General Counsel.

Nov. 17. Answer filed by General Counsel.

Nov. 19. Copy of answer served on taxpayer.

Nov. 30. Motion to place on Circuit Calendar of Oklahoma City, Okla., filed by taxpayer. 11/30/36 granted.

1937.

Sept. 2. Hearing set week of Oct. 18, 1937, Tulsa, Oklahoma.

Oct. 19. Hearing had before Mr. Disney on the merits. Consolidated for hearing and report with dockets 86969 and 86970. Taxpayer's brief due Dec. 18, 1937—respondent's brief due Jan. 18, 1938—taxpayer's reply due Feb. 2, 1938.

Nov. 2. Transcript of hearing Oct. 19, 1937, filed.

1938.

Aug. 16. Memorandum findings of fact and opinion rendered—J. E. Murdock, Division 3. Decision will be entered under Rule 50.

Sept. 7. Computation of deficiency filed by General Counsel.

Sept. 9. Hearing set Sept. 28, 1938, on settlement.

[fol. 2] 1938.

Sept. 15. Motion to vacate memorandum findings of fact and opinion and for reconsideration and redecision of the case, filed by taxpayer. 9/21/38 denied.

Sept. 23. Motion for a continuance until some date after the petitioner's motion for vacating the opinion of the Board and reconsidering and redeciding the case shall have been ruled upon and decided, filed by taxpayer. 9/24/38 denied.

Sept. 28. Hearing had before Mr. Arundell on settlement under Rule 50. Respondent's recomputation not contested. Referred to Mr. Murdock for decision.

Oct. 10. Decision entered—J. E. Murdock, Division 3.

Dec. 30. Petition for review by U. S. Circuit Court of Appeals, Tenth Circuit, with assignments of error filed by taxpayer.

1939.

Jan. 3. Proof of service filed by taxpayer.

Feb. 16. Motion for extension to 4/1/39 to complete and transmit record filed by taxpayer.

Feb. 16. Order enlarging time to 4/1/39 to prepare and transmit record entered.

Mar. 1. Praecipe for record filed by taxpayer with proof of service and agreement endorsed thereon.

BEFORE UNITED STATES BOARD OF TAX APPEALS

PETITION—Filed Oct. 19, 1936

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency dated July 30, 1936, and as a basis of this proceeding alleges as follows:

I

The petitioner is a citizen and resident of the State of Oklahoma and his post office address is Ramsey Tower, Oklahoma City, Oklahoma.

II

The Notice of Deficiency, copy of which is attached hereto and marked Exhibit A, was mailed to the petitioner on July 30, 1936.

[fol. 3] III

The taxes in controversy are income taxes for the calendar year 1932 and the amount involved and in dispute is a deficiency of $2,724.91.

IV

The determination of the deficiency set forth in said Notice of Deficiency is based upon the following errors:

(1) The inclusion in income of alleged profit and income in the sum of $11,276.39, arising out of petitioner's interest in certain property acquired from the Oklahoma City Company in 1931 and owned and operated through 1932 by the Winkler-Koch Royalty Company, a corporation, L. H. Prichard, R. Olsen and petitioner, who are said by the Commissioner to constitute a joint venture, for that petitioner's interest in said joint venture was acquired as compensation for services in 1931, and its then fair market value was its cost, and no income above such cost was realized by him therefrom in 1932.

(2) The inclusion in income of an additional $11,276.39 as petitioner's alleged distributable share in the income and profits of the joint venture referred to in the preceding paragraph, for that, if there were any net profits in said joint venture in which petitioner was entitled to share, the amount thereof was less than that included in income on his return.

(3) The inclusion in income of $3,501.68 alleged to have been the petitioner's distributive share of the net profits of the Prichard-Olsen Joint Venture, for that said joint venture had no profits in said year.

V

The facts upon which the petitioner relies as the basis of this proceeding and in support of the foregoing assignments of error are as follows:

(1) For some time prior to March 19, 1931, L. H. Prichard, a business associate of R. Olsen and petitioner, and acting as agent and trustee for himself and them, carried on negotiations with the Oklahoma City Company, a corporation, of Oklahoma City, Oklahoma for the purchase of a

number of items of property consisting of real estate in fee, royalty interests or mineral rights in real estate, interests in the working interest or leasehold interest in oil and gas [fol. 4] leases, and rights to receive various sums of money to be paid out of oil and gas to be produced from oil and gas properties, being what is commonly known as in-oil payments. All of these parcels and kinds of property were situated in Oklahoma City, in the County and State of Oklahoma, and were generally classed as oil properties, for that they either had or were believed to have oil value. R. Olsen and petitioner were to assist and did assist said L. H. Prichard, who acted as agent and trustee for them as well as for himself, in carrying on said negotiations, and it was understood and agreed among them that whatever contract might be entered into and transactions consummated and properties acquired in the name of L. H. Prichard through such negotiations would belong to the three of them in the proportion of 10% to R. Olsen, 45% to L. H. Prichard, and 45% to petitioner. As a result of the negotiations mentioned, the Oklahoma City Company agreed to sell, convey and assign all the property in question for the consideration of $50,000 to be paid in cash, and $110,000 to be paid with interest out of one-half of the proceeds derived from all oil and or gas produced, saved and sold from the property, and one-half of the proceeds derived from the sale of any part of it. Thereupon L. H. Prichard opened negotiations with the Oil Brokerage and Investment Company, a corporation of Wichita, Kansas, the name of which was later changed to Winkler-Koch Royalty Company already referred to herein, for the purchase by the latter of an interest in said property offered for sale by the Oklahoma City Company. These negotiations resulted in an agreement between L. H. Prichard and said Oil Brokerage and Investment Company that it would pay the $50,000 down payment in cash required to be paid to the Oklahoma City Company, and in consideration thereof should have the right to receive and be paid back that $50,000 out of one-half of any and all revenues of every kind and description that might be realized from the property, and thereafter should receive one-fourth of such revenues until the sum of $110,000 and interest, required to be paid to the Oklahoma City Company in accordance with its proposal out of one-half of all revenues from the property, should be fully

paid from that source, and thereafter should receive one-half of all revenues of every kind and character that might be realized from the property.

On his part, the said L. H. Prichard agreed to consummate the purchase of the property from the Oklahoma City [fol. 5] Company on the terms offered and to take title to it in his name and then to assign to the Oil Brokerage and Investment Company the interest therein that it would be entitled to receive under the agreement with it, and further agreed personally to stand one-half of any loss that it might sustain in event it did not receive back the full $50,000 paid in cash out of the portion assigned to it in the agreement of the revenues from the property. Pursuant to this agreement with the Oil Brokerage and Investment Company, L. H. Prichard, under date of March 19, 1931, entered into a written contract and agreement with the Oklahoma City Company for the purchase of the property in question on the terms previously proposed. Then, under date of March 23, 1931, L. H. Prichard made written assignment to the Oil Brokerage and Investment Company of the interest in the property which it was to acquire under the previous agreement between it and said L. H. Prichard, and also made written assignment to R. Olsen and petitioner of their interests therein. Thereupon the Oil Brokerage and Investment Company paid the $50,000 down payment in cash to the Oklahoma City Company, or to L. H. Prichard for payment to that company, and thereupon the Oklahoma City Company executed and delivered to L. H. Prichard valid instruments conveying to him the various rights and interests in property, and the parcels of property, specified in the contract, together with abstracts of title to the real estate involved and contracts and title papers for the leasehold interests and in-oil payments, and thereupon L. H. Prichard took possession of all of said property and property rights and held the title thereto in trust for himself and for R. Olsen, this petitioner, the Oil Brokerage and Investment Company and the Oklahoma City Company, according to his and their respective interests therein.

Thereafter L. H. Prichard collected all income from the property, sold and conveyed certain portions of it and distributed the revenues and proceeds in accordance with the

rights and interests of the various parties therein as above set forth.

Upon this state of facts, the petitioner says that all and whatever interest was acquired by L. H. Prichard in said property for himself and his said associates, R. Olsen and this petitioner, was received and realized for his services and theirs in negotiating, consummating and carrying out [fol. 6] the said contracts with the Oklahoma City Company and the said contract with the Oil Brokerage and Investment Company, for that he never at any time invested any money or other thing of value of his own or of his said associates, R. Olsen and this petitioner, in the property or the enterprise, or any phase of it, and never agreed, promised or in any way obligated himself to pay any money or thing of value for or on account of the interest which he acquired in said property for himself and his said associates other than that he, for himself and his said associates, agreed to stand one-half of whatever loss the Oil Brokerage and Investment Company might sustain in event it did not receive back the $50,000 cash payment made by it from the source stipulated in the agreement. But this obligation was secondary and contingent, and, because of the known large value and revenue producing character of the property involved, placed no reasonably possible liability on him and his said associates.

If, as the petitioner says, the interest in said property so acquired by L. H. Prichard for himself and R. Olsen and this petitioner was compensation for personal services performed by him and them, or by him for them; then its fair market value at the time acquired was the cost thereof to them. In such event, he and his associates, including this petitioner, would be entitled to have return of their cost in said property before they could have any income or gain therefrom, and the total revenues and income derived from said property during the year 1932 were less than its fair market value, which is the cost of petitioner and associates therein when acquired in 1931. The Commissioner has included the sum of $11,276.39 in petitioner's income as alleged profits accruing to him from said joint venture and coming from said properties. Petitioner says that it is error for the Commissioner to include any part of the revenues and income from the said properties in the year 1932 in his gross income.

(2) By the contract between L. H. Prichard, in his representative capacity as trustee for himself and R. Olsen and this petitioner, and the Oklahoma City Company for the purchase of the property, it is provided that the Company should receive one-half of the proceeds derived from all and every part of the property involved either by income therefrom or gain on the sale thereof until it received the sum of $110,000, with interest thereon at the rate of 6% [fol. 7] per annum from March 19, 1931. The petitioner says that the right to receive this $110,000 represented a retained interest by the Company in the property conveyed and assigned and was in substance and in fact a reserved or excepted interest in the conveyance and assignment thereof to the extent of $110,000. The interest in the property which that $110,000 represented never passed or belonged to or became the property of L. H. Prichard and those whom he represented. None of said sum as derived from said property was his or their income, but at all times was the property and money and income of and belonged to the Oklahoma City Company, and L. H. Prichard, in collecting and receiving it into his hands and paying it over to the Oklahoma City Company, acted as the mere agency or channel through which the Company's retained interest in the property was converted into money and transmitted to it.

The same is true in respect of the $50,000 payment to the Oil Brokerage and Investment Company. The right to receive this sum out of one-half of the first money realized from the property in whatever manner was part of the interest which it purchased from the Oklahoma City Company for $50,000 paid in cash. No part of that $50,000 as realized from the property ever passed or belonged to L. H. Prichard individually or as trustee and agent for R. Olsen and this petitioner or in any way became the money of either of them. In collecting and receiving it into his hands and paying it over to the Oil Brokerage and Investment Company he was merely the agency of that company through which it realized on its right to receive said sum.

During the year 1931 the total revenue and proceeds derived from the property involved was $55,833.17, of which one-half belonged and was paid to and received by the Oklahoma City Company, and the other one-half, less $1,612.49 of expense, was paid to and received by the Oil Brokerage

and Investment Company or its successor, the Winkler-Koch Royalty Company. During the year 1932 the total revenue and proceeds derived from the property was $81,547.15, of which one-half belonged and was paid to and received by the Oklahoma City Company. Out of the remaining one-half, being $40,773.57, there was deducted $713.47 of expense and from the remaining $40,060.11 the Winkler-Koch Royalty Company, successor to the Oil Brokerage and Investment Company, received $23,695.91 to complete the re- [fol. 8] payment to it of the $50,000 with which it had purchased its interest in the property. This left a balance out of said remaining half of $16,364.20, of which 50% went to Winkler-Koch Royalty Company and 22½% was gross income to the petitioner, in event his contention made under assignments of error IV(1) and V(1), supra, is denied and it is determined and held that he had no cost in said property. This amount of gross income would be subject to proper adjustments for depletion, and also, by reason of capital expenditures in development and operation of the property, for depreciation. Upon making these adjustments, the amount of petitioner's net taxable income from said joint venture is determined to be $1,964.93. On his return he included $3,165.19 of income from this source. The Commissioner has included the additional sum of $11,276.39 as income from this source in determining the deficiency here involved. The petitioner says that since he has already overstated such income on his return, the action of the Commissioner in including said additional sum of $11,276.39 as derived from the said joint venture is erroneous.

(3) In 1931 an agreement was made by L. H. Prichard, for himself and as agent and trustee for R. Olsen and petitioner, with a group of persons, fifteen in number and herein referred to as investors, whereby the investors were to furnish L. H. Prichard with money with which to buy oil properties and in-oil payments and were to receive out of the first net income from oil properties or in-oil payments purchased all money furnished by them. Then when they had thus received repayment of all money advanced, the properties and in-oil payments were to belong one-half to the investors, apportioned among them according to the amount of money contributed by each, and one-half to L. H. Prichard, R. Olsen and petitioner, in the proportions of 45%

to L. H. Prichard, 10% to R. Olsen and 45% to petitioner, and L. H. Prichard was to hold the legal title to said properties and in-oil payments in trust for himself and all other parties according to their respective interests therein.

The investors advanced to L. H. Prichard $17,500 for the enterprise, which is termed by the Commissioner the Prichard-Olsen joint venture. During the year 1932 net income from investments of the venture amounted to $15,565.58, according to the Revenue Agent's Report on which the Commissioner's Notice of Deficiency is based in part. This was [fol. 9] all payable and was paid to the investors according to the original agreement and was insufficient to repay the sum advanced by them. The petitioner realized no gain whatever from this source in the taxable year. The Commissioner has included in petitioner's income the sum of $3,501.68, computed at 22½% of $15,565.58, as gain from this venture. The petitioner says that this is erroneous.

VI

The petitioner says that the determination of his income and deductions for the year 1932, as set forth in said Notice of Deficiency, Exhibit A hereto, is correct except in respect of the matters hereinabove alleged to constitute error, and that if and when the errors alleged in this petition are sustained in whole or in part by the decision of the Board, then his tax liability may be ascertained and determined by making whatever corrections or changes, if any, in his net income for said year, as shown by said Notice of Deficiency, may be required by the Board's decision. This may be done under Rule 50.

Wherefore, the petitioner prays that the Board may hear this proceeding and determine that the errors assigned herein are well taken and should be sustained and granted, and that the petitioner's net income and tax liability may be redetermined after a correction of the errors herein assigned in accordance with the decision of the Board in this proceeding.

Chas. H. Garnett, Attorney for Petitioner. 608 Hales Building, Oklahoma City, Oklahoma.

Duly sworn to by J. Steve Anderson. Jurat omitted in printing.

[fol. 10] EXHIBIT "A" TO PETITION

IT:AR:E-1. July 30, 1936.
JF-90D.

Mr. J. Steve Anderson, Ramsey Tower, Oklahoma City, Oklahoma.

SIR:

You are advised that the determination of your income tax liability for the taxable year 1932 discloses a deficiency of $2,724.91 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P:7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner. By (Signed) W. T. Sherwood, Acting Deputy Commissioner.

Enclosures: Statement Form 870 JF/LEK-1.

[fol. 11] Statement

IT:AR:E-1.
JF-90D.

In re: Mr. J. Steve Anderson,
Ramsey Tower,
Oklahoma City, Oklahoma

Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1932	$3,406.00	$681.09	$2,724.91

The report covering the examination of your accounts and records as made by the internal revenue agent in charge, Oklahoma City, Oklahoma, for the year 1932, has been reviewed and approved by this office.

The following changes have been made in your tax liability:

Net income reported on return		$12,184.47
Add:		
1. Income from Joint ventures	$11,612.88	
2. Decrease in loss from sale	8,177.55	19,790.43
Total		$31,974.90
Deduct:		
3. Loss on royalty	$314.09	
4. Contribution deduction increased	1,934.80	2,248.89
Net income adjusted		$29,726.01

Computation of Tax

Net income adjusted		$29,726.01
Less:		
Dividends	$240.00	
Personal exemption	2,500.00	2,740.00
Net income subject to normal tax		$26,986.01
[fol. 12] Normal tax at 4% on $4,000.00		$160.00
Normal tax at 8% on $22,986.01		1,838.88
Surtax on $29,726.01		1,407.12
Total tax assessable		$3,406.00
Tax previously assessed #212507		681.09
Deficiency		$2,724.91

Explanation of Changes.

1. In-oil payments received in connection with the Patterson Deal and oil properties of the Prichard-Olsen Joint Venture not reported have been included as taxable income in accordance with the decision rendered in the Comar Oil Company case, 24 United States Board of Tax Appeals,

688, affirmed in the Circuit Court of Appeals, 64 Fed. (2d) 963.

2. Loss on sale of stocks held for less than two years has been disallowed in accordance with section 23(r) (1) of the Revenue Act of 1932. Loss claimed on sale of Canfield royalty has been disallowed as a transfer of the property was not effected.

3. Income from the Canfield Button royalty has been added and depletion deduction on this royalty allowed on cost has also been taken into consideration in arriving at the revision in income.

4. Contributions have been allowed for the total amount since this deduction is based upon 15 per cent of the net income without the benefit of the deduction.

A letter of final determination is being issued to comply with the request of your attorney, Mr. T. H. Marshall.

A copy of this letter has been mailed to your representative, Mr. T. H. Marshall, 1000 Ramsey Tower, Oklahoma City, Oklahoma, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

[fol. 13] BEFORE UNITED STATES BOARD OF TAX APPEALS

ANSWER—Filed November 17, 1936

Comes Now the respondent by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and for answer to the petition of the above-named taxpayer, admits and denies as follows:

I. Admits the allegations contained in Paragraph I of the petition.

II. Admits the allegations contained in Paragraph II of the petition.

III. Admits the allegation contained in Paragraph III of the petition.

IV. (1) to (3), incl. Denies that the Commissioner erred as alleged in sub-paragraphs (1) to (3), inclusive, of Paragraph IV of the petition.

V. (1) to (3), incl. Denies the allegations contained in sub-paragraphs (1) to (3), inclusive, of Paragraph V of the petition.

Denies each and every material allegation of fact contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) Herman Oliphant, General Counsel for the Department of the Treasury.

Of Counsel: William E. Davis, Stanley B. Anderson, Special Attorneys, Bureau of Internal Revenue.

Received November 17, 1936, United States Board of Tax Appeals.

[fol. 14] BEFORE UNITED STATES BOARD OF TAX APPEALS

Memorandum Findings of Fact and Opinion—August 16, 1938

The Commissioner determined deficiencies in income tax for the calendar year 1932 as follows:

Docket No.	Name	Amount
86968	J. Steve Anderson	$2,724.91
86969	L. H. Prichard	1,918.60
86970	R. Olsen	337.77

The parties filed a stipulation which, as we understand it, disposes of the issue, common to all three proceedings, relating to the proper amount of income to be reported from the so-called Prichard-Olsen Joint Venture. The other issue, common to all three proceedings, is whether the Commissioner erred in including in income for 1932, $11,276.39 in the case of Anderson and Prichard, and $2,505.85 in the case of Olsen, as profits from property acquired from Oklahoma City Company in 1931. An assignment of error in the Olsen case relating to losses was waived by the petitioner with the statement that he had no available evidence. The other assignment of error, also in the Olsen case, challenges the action of the Commissioner in disallowing the deduction

of commissions in the amount of $1,057.25 paid upon the sale of securities, which are alleged to represent ordinary and necessary expenses of a business of buying and selling securities. The last assignment in so far as it related to commissions paid upon purchases, was, apparently, waived. However, if there was no waiver, the result will be the same.

Findings of Fact

The petitioners are individuals who filed their income tax returns for the calendar year 1932 with the Collector of Internal Revenue for the District of Oklahoma. Prichard and Anderson kept books and made their returns upon an accrual basis. Olsen made his return upon the cash basis.

Prichard, after negotiating for several months, entered into a contract with Oklahoma City Company on March 19, 1931, for the acquisition by him of certain royalty interests, fee interests, and deferred oil payments in properties in Oklahoma belonging to the Oklahoma City Company, for $50,000 plus one-half of the proceeds received by Prichard from oil and gas produced from the properties or from sales of the fees until $110,000 is thus paid in addition to the $50,- [fol. 15] 000. Six per cent interest was to be paid, from proceeds of sales or production, upon any unpaid balance of the $110,000 and the seller retained a lien upon the properties and products. The properties were transferred to Prichard immediately.

Prichard, on March 23, 1931, assigned an interest in the properties to Oil Brokerage and Investment Company for $50,000, agreeing that $50,000 should first be paid to Oil Brokerage out of Prichard's share of proceeds under the contract of March 19, 1931, and then Oil Brokerage should have an undivided one-half interest in the properties. If the proceeds failed to pay the $50,000, then Prichard was to pay one-half of the loss. He used the $50,000 obtained from Oil Brokerage to pay on the contract of March 19, 1931.

Prichard, in the above transactions, acted for himself and the other two petitioners, as set forth in a declaration of trust dated March 23, 1931. Their interests were 45 per cent for Prichard, 45 per cent for Anderson, and 10 per cent for Olsen.

The three contracts above referred to are incorporated herein by this reference.

Prichard during 1931 and 1932 received all money representing proceeds from sales and from oil and gas produced from the properties acquired from Oklahoma City Company. He distributed that money in accordance with the various agreements above described. The gross proceeds were $55,833.17 in 1931. Prichard paid that in equal amounts to Oklahoma City Company and Oil Brokerage. Gross proceeds were $81,547.15 in 1932. Prichard distributed one-half thereof to Oklahoma City Company, $23,695.91, plus one-half of the balance, to Oil Brokerage, and the remainder to the three petitioners in the proportions 45, 45, and 10.

Prichard reported as income for 1932 from the above transactions $3,165.19. Anderson reported the same amount. Both deducted depletion. The record does not show what Olsen reported.

The Commissioner, in determining the deficiency against Anderson, added to income reported $11,276.39 as income from the above transactions and gave the following explanation:

> In oil payments received in connection with the Patterson [Oklahoma City Co.] deal * * * not reported have been included as taxable income in accordance with the decision rendered in the Comar Oil Company case, 24 United [fol. 16] States Board of Tax Appeals, 688, affirmed in the Circuit Court of Appeals, 64 Fed. (2d) 963.

He increased the income reported by Prichard in about the same amount on account of royalty income from the above transactions and made an explanation similar to that given Anderson. He increased Olsen's royalty income by $2,505.85 and gave a similar explanation.

OPINION

MURDOCK:

The petitioners requested sixty days after the hearing within which to file a brief. The hearing was held on October 19, 1937. No brief has been filed to date. It may be that the petitioners have become convinced that there is no merit to their contentions. But in any event, we have but a

poor idea of what they contend. The Commissioner treated all receipts less depletion as income, and regarded the disbursements to Oklahoma City Company, and perhaps part of those to Oil Brokerage, as payments of the purchase price of $160,000. We can find no error in this action of the Commissioner. Cf. Comar Oil Co., 24 B. T. A. 688, aff'd 64 Fed. (2d) 965. This case is distinguishable in several important respects from Thomas v. Perkins, 301 U. S. 655, in which the Comar case is mentioned as "in apparent conflict." Payment of the purchase price here was in cash paid by Prichard. Sales of fees were involved. The seller retained a lien. How much of the gross receipts was from sales of fees, how much from oil and gas produced from fees, and how much from royalties on leases is not shown. The record does not justify any change in the Commissioner's determination relating to these items.

There is no evidence in the record to show that Olsen was engaged in any business of buying and selling securities. The only evidence on the subject was the statement of an accountant that Olsen had had about 167 transactions of purchases and sales of securities during 1932. It then developed that the witness had no first hand knowledge of these transactions but was testifying from secondary information. The amount of the commissions was not shown. The circumstances under which they were paid was not shown. The Commissioner, in determining the deficiency, disallowed a deduction in the amount of $2,151.75, and explained his action in part as follows:

[fol. 17] Commissions paid on purchase and sale of securities which reflected a net loss have been disallowed as they are considered an integral part of the transactions resulting in a loss not deductible under section 23(r) of the Revenue Act of 1932.

The record fails to show error in this adjustment.

Decisions will be entered under Rule 50.

PETITIONER'S EXHIBIT #1

Agreement

This agreement made and entered into by and between Oklahoma City Company, a corporation of Oklahoma City, Oklahoma, hereinafter known as party of the first part, and

L. H. Prichard of Oklahoma City, Oklahoma, hereinafter known as party of the second part.

Witnesseth: That, Whereas, the party of the first part is the owner of certain royalty interests, fee ownership and deferred oil payments as indicated in the following described properties situated in Oklahoma County, State of Oklahoma, to-wit:

Shillings Addition
SW¼ 10-11N-3W

Block	Lots	Fee	Royalty
2	11 and 12	None	½
5	32, 33 and 34	None	½
	35 and 36	All	All
11	10	None	½
25	22 and 23	None	½
	24	All	All
30	19 and 20	All	All
33	17 and 18	All	All

Eckroat Addition.
NW¼ 10-11N-3W

14	1, 3, 4, 5, 6, 7, 18, 19, 20, 21, 22, 23, 24, 29 and 30	All	All

[fol. 18]

Terrace Lawn Addition.
NE¼ 10-11N-3W

15	5, 6, 13 and 14	All	All
16	1 to 10 inc., 13 and 14, 19 to 25 inc.	All	All
17	14 to 18 inc.	All	¾
	19 to 28 inc.	All	All
	29 to 32 inc.	All	¾
	33, 43, 46, 47, 48 and 49	All	All
	42	All	⅔
21	1, 2, 9, 10, 15 to 23 inc.	All	All
	41, 42, 45 and 46, 5 and 6	None	½
22	9, 10 and 15 to 22 inc.	All	All
23	1, 2, 5 to 10 inc., 15 to 20 inc., 25, 26, 28, 29, 34, 35, 38 to 42 inc.	All	All
	3 and 4	¾	¾
24	1, 2, 23, 25, 26, 46, 47 and 48	All	¾
30	20, 21, 25 to 28 inc. and 31	All	All
32	3 and 4	All	All
34	17, 18, 25 and 26	All	All
35	3 to 14 inc.	All	All
40	13 and 14	None	½
	15 to 20 inc.	All	All

South Highlands Addition.
NE¼ 10-11N-3W

Block	Lots	Fee	Royalty
7	1 to 6 inc. (Not leased)	All	All
8	3 to 8 inc. (Not leased) 21 to 28 inc. (Not leased)	All	All
18	21 and 22	All	All
26	15 to 18 inc.	None	All
28	1 to 9 inc.	All	All
29	9, 10, 19, 21 and 22	All	All

Whereas, the party of the first part is to receive the sum of $44,431.46 as its proportionate part of ¼th of the ⅞ths of oil and/or gas if and when produced and marketed from Blocks Sixteen (16) and Twenty-three (23), Terrace Lawn Addition, said sum being provided for in an agreement entered into by and between the party of the first part and Anderson-Prichard Oil Corporation and Phillips Petroleum Company, as parties of the second part, and

[fol. 19] Whereas, said party of the first part is to receive the sum of $12,500.00 as its proportionate part of ¼th of ⅞ths of the oil and/or gas if and when produced and marketed from Blocks 34 and 35, Terrace Lawn Addition, in accordance with an agreement entered into between the party of the first part and Skelly Oil Company as party of the second part, and

Whereas, said party of the first part is to receive the sum of $2250.00 as its proportionate part of a total of $17,500.00 to be payable from ¼th of the ⅞ths of the oil and/or gas if and when produced and marketed from Block Thirty (30), Terrace Lawn Addition, which is in accordance with an agreement entered into by and between the party of the first part and the Skelly Oil Company, party of the second part, and

Whereas, the party of the first part shall have and receive the sum of $15,714.27 from its proportionate part of $40,000.00 in oil and/or gas payable from ¼th of the ⅞ths of said production if and when produced from Block Nine (9), South Highlands Addition, it being understood however, between the parties hereto that in the event if for any reason the present lease is released or cancelled without having a well drilled under the said lease, the party of the first part shall not be liable to the party of the second part for the sum above referred to, and

Whereas, the party of the first part is the owner of 11/64ths Working Interest in Blocks 17 and 24 Terrace Lawn Addition to Oklahoma City, which the party of the second part accepts as a part of this transaction, subject only to a provision permitting the operator to deduct from first party's proportionate share of such oil and/or gas if and when produced to reimburse itself for the proportionate part of the cost of drilling and equipping the two wells now completed on said property, the party of the first part hereby agreeing to take care of all other items of expense that may accumulate by reason of other provisions in the operating agreement, for which it is liable thereunder, and in the event the party of the first part should fail to take care of such expenditures, the party of the second part is hereby authorized and directed to deduct such items from the proportionate part of any sum or sums that may be accumulated and become due and payable to the party of the first part under this agreement, and

Whereas, said party of the first part is the owner of a 1/33rd Working Interest in and to the consolidated Blocks [fol. 20] Eighteen (18), Nineteen (19), Twenty (20), Twenty-five (25), Twenty-six (26), Twenty-seven (27), Twenty-eight (28), Twenty-nine (29), South Highlands Addition to Oklahoma City, it being understood between the parties hereto that this Working Interest is a part of an outstanding 3/8ths of the 7/8ths Working Interest covering the above described property, and that a cash bonus of $6,250.00 is chargeable against said interest but is payable only from one-half (½) of 3/8ths of the 7/8ths of said oil and/or gas if and when produced, of which the party of the first part is obligated to pay his proportionate part. In addition thereto, the operator is to receive 6% interest on any money advanced in connection with said operating expense, and

Whereas, the party of the first part represents that a number of wells have been completed and are now producing on various drilling blocks affecting said properties, and the party of the first part further represents that a considerable amount of oil has been accumulated for its benefit, and that there is at this time a considerable sum of money due from various operators, and certain sums of money are due from accumulated deferred lease bonuses, and certain sums of money are due from oil marketed and sold under the varj-

ous oil payments and Working Interests above mentioned, and

Whereas, the party of the first part herein desires to sell all of its right, title and interest of whatsoever nature, together with all of the working interests, deferred lease bonuses, oil payments, royalty interests, fee titles, or any and all other interests in the above described properties, and

Whereas, the party of the second part desires to purchase said interests above described.

Now, Therefore, For and in consideration of the sum of Ten Dollars ($10.00) in hand paid, the receipt of which is hereby acknowledged, and in consideration of the mutual convenants and agreements hereinafter set forth to be kept and performed by the parties hereto, it is agreed as follows:

I

The party of the first part agrees to deliver to the party of the second part good and valid instruments conveying to the party of the second part the various interests referred to, and in addition thereto will deliver abstracts certified to date and certified copies of the various agreements the party [fol. 21] of the first part has entered into between the operators and other parties connected with oil payments and working interests as above mentioned, and upon approval of said abstracts and agreements by the second party's attorneys, the party of the second part agrees to pay to the party of the first part the sum of $50,000.00, $5,000.00 of which is payable to J. M. Field, Jr. as a commission for services rendered, and the party of the first part hereby authorizes and directs the party of the second part to deduct said $5,000.00 from the $50,000.00 herein mentioned, and to pay said sum direct to J. M. Field, Jr., at the time settlement is made upon approval of abstracts and agreements as provided for in this paragraph.

II

The party of the first part agrees that if for any reason it should fail to deliver satisfactory title to any of the lots herein referred to as royalty interests or fee titles, then and in that event it is understood and agreed between the parties hereto that $500.00 per lot shall be deducted from the $110,

000.00, the remainder of the consideration as hereinafter provided for, and the party of the second part is hereby authorized and directed by the party of the first part to deduct such items from the proportionate part of any sum or sums that may accumulate and become due and payable to the party of the first part under this agreement.

III

As a further consideration the party of the first part is to have and receive one-half of the proceeds received by L. H. Prichard which may be derived from all oil and/or gas produced, saved and sold from said above described properties, and shall have and receive one-half of the proceeds derived from the sale of fee title to any or all of the lots conveyed herein, until said party of the first part has received the sum of $110,000.00 in addition to the $50,000.00 hereinabove mentioned. Said $110,000.00 to draw interest at the rate of 6% (Six per cent) per annum from the date of the signing of this agreement, said interest to be paid from the amounts accumulated from the proceeds through sales or production as above mentioned, at which time it is understood and agreed that the party of the first part shall have no further claim to the properties above described, and it is also agreed [fol. 22] that the party of the first part shall have a first lien and claim against that one-half of all oil and gas production and fee interest as above described from which the $110,000.00 is payable as provided for herein, it being understood and agreed that said lien and claim shall not in any way affect the one-half interest in all oil and gas production and fee interest or the revenue therefrom which party of the second part is to have and receive under this agreement. It is further understood between the parties hereto that the party of the first part has entered into an agreement with J. M. Field, Jr., to pay a commission of $7,500.00 to be deducted from the $110,000.00, if and when paid, and the party of the first part hereby authorizes and directs the party of the second part to pay said J. M. Field, Jr., his proportionate part of any and all sums that may be accumulated and collected by L. H. Prichard under the terms as stipulated in this agreement plus the 6% interest as provided for, it being understood that J. M. Field, Jr., at all times shall receive 75/1100 of any amount accumulated and payable to the party of the first part insofar as it covers the $110,000.00.

It being understood and agreed between the parties hereto that any sum or sums accumulating under this agreement is payable direct to the party of the second part or assigns, including such amounts that may become due and payable from pipe line companies purchasing oil and/or gas from said properties, and it is agreed that one-half (½) of such revenues due the party of the first part shall be payable at the end of each ninety days after May 25, 1931, such sums to be placed to the credit of the party of the first part, and said J. M. Field, Jr., as provided for herein, in the Tradesmens National Bank of Oklahoma City, Oklahoma at which time a full, complete, accurate and itemized statement of any oil payments or other revenues shall be submitted, and said Bank is hereby fully authorized and directed by the party of the first part to deliver to the party of the second part good and sufficient receipts for such sums, and it is agreed that a copy of this agreement, with a release from the party of the first part and said J. M. Field, Jr., shall be placed in escrow in said Bank until the sum of $110,000.00 plus interest as provided for, has been paid in full, at which time said Bank is authorized and directed to deliver to the party of the second part the releases attached thereto.

[fol. 23]

IV

It is further understood and agreed between the parties hereto that the party of the first part shall deliver to the party of the second part any sum or sums accumulated to date or to be accumulated from any of said properties or any sum or sums that may accumulate up to the time of delivery of conveyances, division orders and transfer orders necessary to carry out this agreement, and it is understood and agreed that Division Orders, Transfer Orders and any other instruments necessary for the transfer of such funds shall be executed by first party and submitted for the approval and the signature of the party of the second part.

V

It is further understood and agreed between the parties hereto that the party of the first part shall pay to date all ad valorem taxes now due and payable against any or all of the properties herein mentioned, but it is understood and agreed thatt he parties of the second part shall accept said properties with unpaid special taxes now appearing of rec-

ord and under this contract the party of the first part shall not be held for the payment of any such special taxes, and it is agreed that such special taxes shall not at any time interfere with first party's receipt of its fifty per cent (50%) of said oil runs.

This contract shall extend to, inure to the benefit of, and be binding upon the parties hereto and their respective heirs, personal representatives, successors and assigns.

Witness, Our hands and seal this 19th day of March, 1931.

Attest.: (S.) A. R. O'Leary, Secretary.

Oklahoma City Company, by (S.) J. M. Whiteley, President, Party of the First Part. (Seal.) (S.) L. H. Prichard, Party of the Second Part.

STATE OF OKLAHOMA,
Oklahoma County, ss:

Before me, the undersigned, a Notary Public in and for said County and State on this 19th day of March, 1931, personally appeared J. M. Whiteley to me known to be the iden- [fol. 24] tical person who subscribed the name of the maker thereof, Oklahoma City Company, to the foregoing instrument as its President, and acknowledged to me that he executed the same as his free and voluntary act and deed and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

Given under my hand and seal the day and year last above written. (S.) Louis W. Johnson, Notary Public. My Commission expires June 24th, 1933. (Seal.)

STATE OF OKLAHOMA,
Oklahoma County, ss:

Before me, the undersigned, a Notary Public, in and for said County and State on this 19th day of March, 1931 personally appeared L. H. Prichard, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same

as his free and voluntary act and *and* deed for the uses and purposes therein set forth.

Given under my hand and seal the day and year last above written. (S.) Elmer H. Wahl, Notary Public. My commission expires March 15, 1935. (Seal.)

PETITIONER'S EXHIBIT #2

Assignment of Interests

Whereas, on the 19th day of March, 1931, a certain agreement was made and entered into by and between Oklahoma City Company, a corporation, referred to as party of the first part, and L. H. Prichard of Oklahoma City, Oklahoma, party of the second part, said agreement covering certain property and varied interests located in Oklahoma County, State of Oklahoma, more particularly described in the attached certified copy of the original agreement, and

Whereas, said contract and all rights thereunder or incident thereto are now owned by L. H. Prichard, subject to the terms and conditions as stipulated in said agreement.

Now, Therefore, for and in consideration of the sum of Fifty Thousand Dollars ($50,000.00), the receipt of which is hereby acknowledged, the undersigned hereby bargains, sells, transfers, assigns and conveys unto The Oil Brokerage [fol. 25] and Investment Company, a Kansas Corporation, an undivided one-half (½) interest in the properties and the various interests described in said agreement, subject to the terms and conditions as provided for therein, it being understood and agreed that said Oil Brokerage and Investment Company, shall have and receive any and all revenues of every kind and description accumulated and received from said properties, payable to said L. H. Prichard as provided for in said agreement, until said Oil Brokerage and Investment Company has received the sum of Fifty Thousand Dollars ($50,000.00), and it is understood and agreed that after said sum has been fully paid, said Oil Brokerage and Investment Company and L. H. Prichard shall each own an undivided one-half (½) interest in said properties, and said L. H. Prichard shall execute and deliver to said Oil Brokerage and Investment Company good and sufficient instruments conveying to said Oil Brokerage and Invest-

ment Company his undivided one-half (½) interest in said properties as referred to in the agreement hereto attached.

It is further understood and agreed between the parties hereto that in the event the revenues from said properties, as provided for in the attached agreement, are not sufficient to reimburse said Oil Brokerage and Investment Company for the Fifty Thousand Dollars ($50,000.00) advanced as a consideration for this assignment, then and in that event, it is understood and agreed between the parties hereto that said L. H. Prichard shall pay one-half (½) of such loss as may be sustained on account of the failure of the described properties to produce sufficient revenue to reimburse said Oil Brokerage and Investment Company for the cash consideration of $50,000.00 as herein provided for.

This Assignment shall extend to, inure to the benefit of, and be binding upon the parties hereto and their respective heirs, personal representatives, successors and assigns.

Witness our hands and seals this 23 day of March, 1931.

(S.) Fred C. Koch, President Oil Brokerage & Investment Co., (S.) L. H. Prichard.

[fol. 26]. PETITIONER'S EXHIBIT #3

Contract and Declaration of Trust

This Agreement made and entered into by and between L. H. Prichard of Oklahoma City, Oklahoma, party of the first part, and J. Steve Anderson and R. Olsen of Oklahoma City, Oklahoma, parties of the second part, Witnesseth:

That, Whereas, on the 19th day of March, 1931, the party of the first part, L. H. Prichard, entered into a certain purchase contract and agreement with the Oklahoma City Company, a corporation, whereby said party of the first part, L. H. Prichard, did purchase certain real estate in fee simple and varied oil royalty and overriding royalty interests, deferred oil payments and working interests in oil leases in certain lands in Oklahoma County, Oklahoma, more particularly described in said contract, a photostatic copy of which is hereto attached, marked Exhibit "A" and made a part hereof as if copies herein in words and figures;

And, Whereas, the consideration of $50,000.00 paid by the said L. H. Prichard for said properties was advanced and

furnished to the said L. H. Prichard by the corporation known as The Oil Brokerage and Investment Company, a Kansas corporation, under an agreement whereby the said The Oil Brokerage and Investment Company should receive all the revenues and proceeds from said properties until and when it should receive reimbursement to the full extent of $50,000.00 so advanced by it as the consideration for said properties, after which reimbursement it was understood that the said The Oil Brokerage and Investment Company and L. H. Prichard should each own a one-half interest in said properties and receive the revenues in such proportion, except that in the event such revenues are not sufficient to reimburse The Oil Brokerage and Investment Company for its advancement of $50,000.00 to the said L. H. Prichard, then the said L. H. Prichard should pay to the said The Oil Brokerage and Investment Company one-half of the loss sustained by reason of the failure of the properties to produce sufficient revenues to reimburse the said The Oil Brokerage and Investment Company for its advancement of $50,000.00, all as more fully provided in that certain contract between The Oil Brokerage and Investment Company and L. H. Prichard dated March 23, 1931, a copy of which [fol. 27] is hereto attached, marked Exhibit "B" and made a part of this contract as if copied herein;

And Whereas, in the purchase of said properties the said L. H. Prichard was not acting for himself alone, but was acting for and on behalf of himself and the undersigned parties of the second part, J. Steven Anderson and R. Olsen, whose interests in said contracts and transactions have not been made known;

Now, Therefore, for the purpose of declaring the respective interests of the several parties hereto in and to the said contracts and all rights accruing thereunder, the undersigned party of the first part, L. H. Prichard, agrees by and with the parties of the second part, J. Steve Anderson and R. Olsen, that he holds the title to said properties and all rights accruing thereunder and under said contracts above set forth in trust for the said J. Steve Anderson, R. Olsen and himself, L. H. Prichard, in the following proportions, to-wit:

L. H. Prichard	Forty-five per cent (45%)
J. Steve Anderson	Forty-five per cent (45%)
R. Olsen	Ten per cent (10%)

all subject to the provisions of the contracts and assignments made pursuant to the original agreements, as hereinabove set forth, with the Oklahoma City Company and The Oil Brokerage and Investment Company.

It is further understood and agreed, however, that should the said L. H. Prichard be called upon under the terms of said contract to bear any loss by reason of the failure of said properties so purchased thereunder to repay or reimburse the said The Oil Brokerage and Investment Company the sum of $50,000.00, the purchase price of said properties, then the parties hereto shall pay such loss so to be borne under the terms of said contract by the said L. H. Prichards in the proportions above set forth.

This contract to be binding upon the heirs, successors, administrators and assigns of the parties hereto.

Witness Our Hands this 23rd day of March, 1931.

(S.) L. H. Prichard, Party of the First Part. (S.) R. Olsen, (S.) J. Steve Anderson, Parties of the Second Part.

[fol. 28] State of Oklahoma,
Oklahoma County, ss:

Before me, the undersigned, a notary public in and for said County and State, on this 23rd day of March, 1931, personally appeared L. H. Prichard, J. Steve Anderson and R. Olsen, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year last above written. (S.) Clara D. Johnson, Notary Public. (Seal.) My commission expires June 28, 1932.

Before United States Board of Tax Appeals

Motion of Petitioners for Vacation of Findings of Fact and Opinion and for Reconsideration and Redecision of the Case—Filed September 15, 1938

On August 16, 1938, the Board entered its memorandum findings of fact and opinion in the above entitled cases. The petitioners now move and ask the Board to vacate its

said findings of fact and opinion and reconsider and redecide the cases.

As grounds for their motion they say that the Board in its opinion plainly erred in its statement of the law applicable to the issue of whether oil royalties received by L. H. Prichard as trustee for himself and the other petitioners from properties purchased from the Oklahoma City Company under a contract providing that such royalties should be received by it as part of the consideration for the transfer of such properties was includable in the income of the petitioners, and when paid over to the Oklahoma City Company was to be considered as merely a cash payment by them on the purchase price of the property.

Other issues are raised in the pleadings but the reconsideration and redecision of the cases is not urged on account of them.

Statement in Support of Motion

In the first place, complaint is made in the opinion of the Board that notwithstanding the petitioners took time to file a brief, they never filed any. Commenting on this, the Board says that:

[fol. 29] "It may be that the petitioners have become convinced that there is no merit to their contentions."

We respectfully submit that this conclusion of the Board from the fact of petitioners failure to file a brief is unwarranted. It is the Board's duty to decide cases before it upon the merits of the issues presented in the light of the evidence in the record, whether these issues are briefed or not. The failure to file a brief cannot fairly be considered as a waiver by the petitioners of their contentions or as a confession of lack of merit in them.

It is granted that briefs are or should be helpful to the Board in deciding cases, and that a brief for petitioners should have been filed in these cases. There are several reasons, including an accumulation of misfortunes to petitioners' counsel, which prevented the filing, or at least resulted in the failure to file, a brief on their part. It would not be profitable to enumerate these here; because the Board would doubtless not regard them as any sufficient reason for reconsidering and redeciding the case. But it is emphasized that petitioners not only are not convinced that there is no

merit to their contentions, but are fully convinced that there is merit to their principal one.

Then it is said in the Board's opinion that

"We have but a poor idea of what they contend."

The principal contention is that the amount of in-oil payments received by L. H. Prichard as trustee for petitioners, and by him paid over to the Oklahoma City Company in compliance with the contract between him and that company is not in any part includable in the income of the petitioners. This contention would seem to be quite plainly stated in the second assignment of error and in the statement of facts relied on in support of that assignment as set forth in the petition, and plainly indicated in the opening statement of counsel and in the evidence. Indeed, the Board seems to have understood this contention, for it ruled that the case was distinguished from Thomas vs. Perkins, 301 U. S. 655, in which it is held that a vendor of an oil and gas property who by the terms of the contract of sale is to receive a payment out of part of the oil to be thereafter produced from the property, is the direct recipient of the [fol. 30] amounts applied on such in-oil payment as his income and none of any amount so applied is income to the vendee.

In commenting on the contract in the instant case the Board says that the purchase price here was in cash paid by Prichard. This statement is plainly erroneous, unless the Board takes the view that the moneys applied on in-oil payments to the Oklahoma City Company, because these passed through Prichard's hands before reaching that Company, were first income to him and were his money, and when turned over to the Company were a cash payment on the purchase price. This view is without support in the facts of the case or in the law.

Paragraph III of the contract between the Oklahoma City Company and Prichard provides that the Company was

"to have and receive one-half of the proceeds received by L. H. Prichard which may be derived from all oil and/or gas produced, saved and sold from said above described property,"

and further provides that Prichard was to make quarterly reports of the receipts and place the Company's portion of them to its credit in the bank. The fact that title passed

from the Company to Prichard by proper instruments of conveyance is not material in the light of the decisions. The contract here in this respect is not distinguishable from that in Ortiz Oil Co., 37 B. T. A. 656, in which the Board held that the in-oil payments were not income to the vendee, but were income direct to the vendor.

In Commissioner vs. Fleming (5th C. C. A.), 82 F. (2d) 324 and in Commissioner vs. Williams (5th C. C. A.), 82 F. (2d) 328, the facts were that an owner of an oil and gas lease made an outright sale and conveyance thereof without the retention or reservation of any interest in or lien upon the property conveyed, but with a contract providing that the vendee should "pay" to the vendor certain funds out of a portion of the oil and gas that might thereafter be produced from such property.

Neither are the provisions of the contract in the instant case different in any material respect from that involved in Palmer vs. Bender, 287 U. S. 551. That case holds that the recipient of the oil payment is entitled to the depletion de-
[fol. 31] duction thereon. This holding necessarily makes the in-oil payment income to the recipient and excludes it from income of the vendee of the property. There cannot be two allowances of depletion on the same income, and the in-oil payment could not be included in income of the vendee without allowing him a deduction for depletion thereon. Helvering vs. Twin Bell Oil Syndicate, 293 U. S. 312.

So we say that the holding of the Board in its opinion in the instant case that the in-oil payments in controversy were income to the petitioners first, and when paid to the Oklahoma City Company, were a cash payment by them on the purchase price of the property is contrary to settled authority. We do not see how it could be seriously contended that the Company would be denied a depletion deduction on the in-oil payments which it received. If so, these payments could not be income to the petitioners.

But the Board says that

"Sales of fees were involved. The seller retained a lien."

The Board does not indicate what effect in its view the retention of a lien on the property would have, and we know of no holding that the retention of a lien on oil and gas property sold to secure an in-oil payment or to secure payment

of the purchase price would take the transaction out of the rule laid down in the cases above cited. It does not appear from the record that sales of fees were involved, but if they were, still the proceeds of such sales were not income to or received by the petitioners through Prichard as their trustee, but these proceeds represented a retained interest in the property by the vendor under the terms of the contract of sale. Under that contract it was not possible for there to be any income to Prichard from one-half of the gross realization in whatever manner from the property until the Oklahoma City Company had received the sum which it was to receive out of one-half of all realization therefrom.

For the reasons and on the grounds above set forth the petitioners respectfully pray that the Board vacate its findings and opinion herein and reconsider and redecide the cases by holding that the entire amount of in-oil payments as shown in each case by the notice of deficiency attached [fol. 32] to the petition therein, is excluded from income of the petitioner in such case.

Chas. H. Garnett, 608 Hales Building, Oklahoma City, Oklahoma, Attorney for Petitioners.

Denied September 21, 1938. (s) J. E. Murdock, Member U. S. Board of Tax Appeals.

BEFORE UNITED STATES BOARD OF TAX APPEALS

DECISION

Pursuant to the Board's Memorandum Findings of Fact and Opinion entered August 16, 1938, the respondent, on September 7, 1938, filed a proposed computation which was not contested by the petitioner at the hearing on September 28, 1938. Therefore, it is

Ordered and Decided, that there is a deficiency for 1932 in the amount of $2,637.41.

(Signed) J. E. Murdock, Member, United States Board of Tax Appeals. (Seal.)

Entered October 10, 1938.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

PETITION FOR REVIEW OF FINDINGS OF FACT, OPINION, DECISION AND JUDGMENT OF UNITED STATES BOARD OF TAX APPEALS IN THE CASE OF J. STEVE ANDERSON VS. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT, B. T. A. DOCKET NO. 86,968—Filed December 30, 1938

To the Honorable Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

Now comes J. Steve Anderson by Chas. H. Garnett, his attorney, and respectfully shows unto the court that:

I

The petitioner, herein sometimes referred to as the taxpayer, is a citizen and resident of Oklahoma County in the State of Oklahoma and his address is Ramsey Tower, Oklahoma City, Oklahoma.

The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States. [fol. 33] Guy T. Helvering, herein sometimes referred to as the Commissioner.

The taxpayer filed his income tax return for the calendar year 1932 with the Collector of Internal Revenue for the District of Oklahoma, whose office is located within the judicial circuit of the United States Circuit Court of Appeals for the Tenth Circuit wherein the taxpayer also resides.

II

The Commissioner determined a deficiency in income taxes against the taxpayer of $2,724.91 for the year 1932 and on July 30, 1936, in accordance with the provisions of the applicable statute, sent the taxpayer by registered mail a notice of said deficiency.

Within ninety days thereafter the taxpayer filed his appeal, in the form of a petition for review of the determination of said deficiency as set forth in said notice of deficiency, with the United States Board of Tax Appeals. The case was in due course tried before the Board and submitted for its decision, and on August 16, 1938, the Board promulgated its findings of fact and opinion therein, and on October 10, 1938, entered its judgment and final order of re-

determination wherein and whereby it ordered and decided that there was a deficiency of $2,637.41 in the taxpayer's income tax for 1932.

III

The determination by the Commissioner of the deficiency in taxpayer's income tax for 1932 arose out of and was based upon the following briefly outlined state of facts:

In 1931 L. H. Prichard, acting for himself and R. Olsen and the petitioner jointly, contracted to purchase and purchased from Oklahoma City Company, a corporation, certain property and property rights consisting of fee title to real estate, oil and gas royalty interests in real estate and the right to receive in-oil payments out of oil and gas production from real estate, according to the terms and conditions of a written contract, to which reference may be made for a fuller statement. The title to the property and property rights thus acquired was taken and held by Prichard in the proportion of 45% to himself, 45% to petitioner, and [fol. 34] 10% to Olsen, according to a written agreement between them. The contract for the purchase of the property and property rights provided for payment of a cash consideration of $50,000 and that the seller should receive one-half of all proceeds derived from oil and gas produced from the property or from the sale of fee title to any of the real estate until it had received the additional sum of $110,000 with 6% interest thereon from the date of the contract, and that the seller should have a first lien and claim against one-half of all of the oil and gas production and the fee interest in the real estate from the proceeds of which said sum was payable until it was fully paid.

During 1932 the gross sum of $81,547.15 was received by Prichard from oil and gas production and in-oil payments from the property, and one-half thereof was paid to Oklahoma City Company in accordance with the terms of the contract. No part of the sum paid over to Oklahoma City Company was included in income on petitioner's tax return. The Commissioner determined that all of the $81,547.15 was gross income to Prichard, Olsen and petitioner in the proportions stated above, and included the petitioner's proportion thereof in his income and based the determination of a deficiency in tax thereon.

At the time Prichard was negotiating with Oklahoma City Company for the purchase of the property and property

rights in question, he was also negotiating with Oil Brokerage and Investment Company, a corporation, the name of which was later changed to Winkler-Koch Company, for the purchase by it of an interest therein. These negotiations resulted in the sale and assignment to Oil Brokerage Company of a half interest in all of the property and property rights acquired by Prichard from Oklahoma City Company, subject to the terms and conditions of his contract with that company, for the price and consideration of $50,000 in cash, but with the provision that Oil Brokerage Company should have and receive all revenues of every kind realized from the property which were payable to him under his agreement with Oklahoma City Company until it had received $50,000, and with the further provision that in event it failed to receive full $50,000 from such revenues, then Prichard would pay half of its loss.

In 1931 Oil Brokerage Company received part of the [fol. 35] $50,000 from the specified revenues and in 1932 received the final payment thereon of $23,695.91. The petitioner did not include in income on his tax return any part of the above amount paid to Oil Brokerage Company. The Commissioner in determining the deficiency involved included 45% thereof in petitioner's income.

After Oil Brokerage Company had received the final payment of $23,695.91 out of the specified revenues purchased under its contract, there remained the sum of $16,364.20 out of the half of the proceeds derived from the properties in 1932 which went to Prichard under his contract with Oklahoma City Company. One-half of this, or $8,182.10, was paid to Oil Brokerage Company, and the other half was divided among Prichard, Olsen and petitioner in the agreed percentages. The petitioner did not include in income on his tax return any part of the above sum of $8,182.10 payable and paid to Oil Brokerage Company, but did include 45% of the like sum divided among Prichard, Olsen and himself. The Commissioner in determining the deficiency involved included 45% of said sum of $8,182.10 paid to Oil Brokerage Company in petitioner's income.

The action of the Commissioner in including in petitioner's income 45% of the payments of money derived from the properties involved which were retained by and payable to Oklahoma City Company and those which were acquired by and payable to Oil Brokerage Company was assigned as error by the petitioner before the Board of Tax Appeals.

In the findings of fact, opinion and final decision of the Board above referred to, the Commissioner's contention is upheld and all of the income from the property and property rights involved during 1932 is deemed and held to be income to Prichard, Olsen and petitioner in the percentages above mentioned, and the deficiency in tax adjudged against petitioner for said year is based thereon.

IV

The petitioner says that in the record and proceedings before the Board of Tax Appeals and in its opinion, decision and final order of redetermination as rendered and entered, manifest error occurred and intervened to the prejudice of the petitioner, and he assigns the following errors and each of them and avers that these occurred in the [fol. 36] said record, proceedings, findings of fact, opinion, decision and final order of redetermination, and that upon these he relies to reverse the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to-wit:

(1) The Board of Tax Appeals erred in that its findings of fact in respect of the source from which derived, the ownership, apportionment and payment over of the gross proceeds derived and realized from said property and property rights in 1932 is not supported by any evidence in the record and is contrary to the evidence.

(2) The Board of Tax Appeals erred in holding that the half of the gross proceeds derived and realized in 1932 from oil and gas production and from in-oil payments from the property and property rights involved which was payable and was paid to Oklahoma City Company was income to Prichard, Olsen and petitioner.

(3) The Board of Tax Appeals erred in refusing to hold that no part of the gross proceeds realized and derived in 1932 from the property and property rights involved which were payable and were paid to Oklahoma City Company was income to Prichard, or Olsen or petitioner or any of them.

(4) The Board of Tax Appeals erred in holding that that part of the half of the gross proceeds derived and realized from said property and property rights in 1932 and which were paid to Oil Brokerage Company in final payment of the

$50,000 due it by contract, was income to Prichard, Olsen and petitioner.

(5) The Board of Tax Appeals erred in refusing to hold that no part of the gross proceeds derived and realized from said property and property rights in 1932 which were payable and were paid to Oil Brokerage Company in final payment of the $50,000 due it by contract was income to Prichard or Olsen or petitioner or any of them.

(6) The Board of Tax Appeals erred in holding that all of the half of the gross proceeds derived and realized from said property and property rights in 1932 remaining after Oil Brokerage Company had received payment in full of the $50,000 payable to it by contract out of such one-half thereof, was income to Prichard, Olsen and petitioner.

[fol. 37] (7) The Board of Tax Appeals erred in refusing to hold that only one-half of that part of the half of the gross proceeds derived and realized from said property and property rights in 1932 remaining after Oil Brokerage Company had been paid in full the $50,000 payable to it therefrom by contract was income to Prichard or Olsen or petitioner or any of them.

(8) The Board of Tax Appeals erred in determining that there was a deficiency in petitioner's income tax for the year 1932 in the amount of $2,637.41, and rendering a judgment therefor.

(9) The Board of Tax Appeals erred in not determining and adjudging that there was no deficiency in petitioner's income tax for 1932.

Wherefore, the petitioner asks that a transcript of the proceedings before the Board of Tax Appeals be prepared in accordance with law and the rules of the United States Circuit Court of Appeals for the Tenth Circuit and transmitted to the clerk of said court for filing; that appropriate action be taken by said court to the end that the errors complained of herein may be reviewed and corrected; that the said decision of the said Board be reversed and set aside and the cause remanded to the Board with directions to conform its final order, decision and judgment to the law applicable as declared by said court; and that the petitioner

have such further or other and different relief in the premises as shall be lawful, just and proper.

Chas. H. Garnett, 608 Hales Building, Oklahoma City, Oklahoma, Attorney for Petitioner.

Duly sworn to by Chas. H. Garnett. Jurat omitted in printing.

[fol. 38] BEFORE UNITED STATES BOARD OF TAX APPEALS

NOTICE OF FILING PETITION FOR REVIEW—Filed January 3, 1939

To Guy T. Helvering, Commissioner of Internal Revenue of the United States, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue:

You, and each of you, are hereby notified that the petitioner above named did on the 30th day of December, 1938, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit, of the decision of the Board heretofore rendered in the above entitled case. A copy of said petition for review and the assignments of error thereon, as so filed, is hereto attached and served upon you with this notice.

Dated this 31st day of December, 1938.

Chas. H. Garnett, Attorney for Petitioner.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby accepted and acknowledged this 3rd day of January, 1939.

J. P. Wenchell, Chief Counsel, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS

PRAECIPE FOR RECORD—Filed March 1, 1939

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals

for the Tenth Circuit at Denver, Colorado, prior to April 1, 1939, a transcript of the record in the above cause, said date being the time to which the filing of such transcript in said court has been extended, to be prepared and transmitted as required by law and by the rules of said court, and [fols. 39-40] to include in said transcript of record the following documents or certified copies thereof, to-wit:

1. The docket entries of all proceedings before the Board of Tax Appeals.

2. The pleadings of both parties before the Board of Tax Appeals.

3. The opinion of the Board of Tax Appeals, together with copies of the exhibits therein referred to and by reference made a part thereof.

4. The motion of petitioner for vacation of findings of fact and opinion of the Board and for reconsideration and redecision of the case, and order of the Board denying such motion.

5. The decision of the Board.

6. The petition for review filed by the petitioner in the above cause.

7. The order enlarging time for the preparation, transmission and delivery of the record to the Circuit Court of Appeals. Not included in record.

8. This praecipe.

Chas. H. Garnett, Attorney for Petitioner, 608 Hales Building, Oklahoma City, Oklahoma.

Service of this praecipe is accepted and acknowledged this 1st day of March, 1939, and the same is hereby agreed to.

J. P. Wenchell, Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 41] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 86969

L. H. PRICHARD, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

(Appearances and docket entries appear in identical form at page 1, of the printed record and are therefore omitted here.)

PETITION—Filed October 19, 1936

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency dated July 30, 1936, and as a basis of this proceeding alleges as follows:

I

The petitioner is a citizen and resident of the State of Oklahoma, and his post office address is Ramsey Tower, Oklahoma City, Oklahoma.

II

The Notice of Deficiency, copy of which is attached hereto and marked Exhibit A, was mailed to the petitioner on July 30, 1936.

III

The taxes in controversy are income taxes for the calendar year 1932, and the amount involved and in dispute is a deficiency of $1,918.60.

IV

The determination of the deficiency set forth in said Notice of Deficiency is based upon the following errors:

(1) The inclusion in income of alleged profits and income arising out of petitioner's interest in certain property acquired from The Oklahoma City Company in 1931 and [fol. 42] owned and operated throughout 1932 by Winkler-Koch Royalty Company, a corporation, J. Steve Anderson, R. Olsen, and petitioner, who are said by the Commissioner to constitute a joint venture, for that petitioner's interest in said joint venture was acquired as compensation for serv-

ices in 1931, and its then fair market value was its cost, and no income above such cost was realized by him therefrom in 1932.

(2) The inclusion in income of an additional $11,276.39 to petitioner's alleged distributive share in the income and profits of the joint venture referred to in the preceding paragraph, for that, if there were any net profits in said joint venture in which petitioner was entitled to share, the amount thereof was less than that included in income on his return.

(3) The inclusion in income of $3,501.68 alleged to have been the petitioner's distributive share of the net profits of Prichard-Olsen joint venture, for that said joint venture had no profits in said year.

V

The facts upon which the petitioner relies as the basis of this proceeding and in support of the foregoing assignments of error are as follows:

(1) For some time prior to March 19, 1931, the petitioner carried on negotiations with The Oklahoma City Company, a corporation, of Oklahoma City, Oklahoma, for the purchase of a number of items of property consisting of real estate in fee, royalty interests or mineral rights in real estate, interests in the working interest or leasehold interest in oil and gas leases, and rights to receive various sums of money to be paid out of oil and gas to be produced from oil and gas properties, being what is commonly known as in-oil payments. All of these parcels and kinds of property were situated in Oklahoma City, in the County and State of Oklahoma, and were generally classed as oil properties, for that they either had or were believed to have oil value. In carrying on these negotiations, the petitioner was assisted by his business associates, J. Steve Anderson and R. Olsen, and represented and acted for them as well as himself, and it was understood and agreed among them that whatever contract might be entered into and transaction consummated and property acquired in the name of the petitioner through such negotiations would belong to the three of them in the proportion of 45% to J. Steve Anderson, 45% to petitioner, and 10% to R. Olsen. As a result of the negotiations [fol. 43] mentioned the Oklahoma City Company agreed to sell, convey and assign all the property in question for the

consideration of $50,000 to be paid in cash and $110,000 to be paid with interest out of one-half of the proceeds to be derived from all oil and/or gas produced, saved and sold from the property and one-half of the proceeds that might be derived from the sale of any part of it.

Thereupon the petitioner opened negotiations with the Oil Brokerage and Investment Company, a corporation, of Wichita, Kansas, the name of which was later changed to the Winkler-Koch Royalty Company already referred to herein, for the purchase by the latter of an interest in said property offered for sale by the Oklahoma City Company. These negotiations resulted in an oral agreement between him and said Oil Brokerage and Investment Company that it would pay the $50,000 down payment in cash required to be paid to the Oklahoma City Company, and in consideration thereof should have the right to receive and be paid back that $50,000 out of one-half of any and all revenues of every kind and description that might be realized from the property, and thereafter should receive one-fourth of such revenues until the sum of $110,000 to be paid to the Oklahoma City Company in accordance with its proposal out of one-half of all revenues from the property, should be fully paid from that source, and thereafter should receive one-half of all revenues of every kind and character that might be realized from the property.

On his part, the petitioner agreed to consummate the purchase of the property from the Oklahoma City Company on the terms offered and to take title to it in his name, and then to assign to the Oil Brokerage and Investment Company the interest therein that it would be entitled to receive under his agreement with it, and further agreed personally to stand one-half of any loss that it might sustain in event it did not receive back the full $50,000 paid in cash out of the portion assigned to it in the agreement of the revenues from the property.

Pursuant to this agreement with the Oil Brokerage and Investment Company, petitioner, under date of March 19, 1931, entered into a written contract and agreement with the Oklahoma City Company for the purchase of the property in question on the terms previously proposed. Then, under date of March 23, 1931, petitioner made written as- [fol. 44] signment to the Oil Brokerage & Investment Company of the interest in the property which it was to acquire under the previous agreement between it and petitioner, and

also made written assignment to J. Steve Anderson and R. Olsen of their interests therein. Thereupon the Oil Brokerage & Investment Company paid the $50,000 down payment in cash to the Oklahoma City Company or the petitioner for payment to that Company, and thereupon the Oklahoma City Company executed and delivered to petitioner valid instruments conveying to him the various rights and interests in property and the parcels of property specified in the contract, together with abstracts of title to the real estate involved and contracts and title papers for the leasehold interests and in-oil payments, and thereupon the petitioner took possession of all of said property and property rights and held the title thereto in trust for himself and for said J. Steve Anderson, R. Olsen, the Oil Brokerage & Investment Company, and the Oklahoma City Company, according to his and their respective interests therein.

Thereafter petitioner collected all income from the property, sold and conveyed certain portions of the property, and distributed the revenues and proceeds in accordance with the rights and interests of the various parties therein as above set forth.

Upon this state of facts, the petitioner says that all and whatever interest was acquired by him in said property for himself and his said associates, J. Steve Anderson and R. Olsen, was received and realized for his services in negotiating, consummating and carrying out the said contracts with the Oklahoma City Company and the said contract with the Oil Brokerage & Investment Company, for that he never at any time invested any money or other thing of value of his own or of his said associates in the property or the enterprise, or any phase of it, and never agreed, promised, or in any way obligated himself to pay any money or thing of value for or on account of the interest which he acquired in said property for himself and his associates, other than that he agreed to stand one-half of whatever loss the Oil Brokerage & Investment Company might sustain in event it did not receive back the $50,000 cash payment made by it from the source stipulated in the agreement. But this obligation was secondary and contingent and, because of the [fol. 45] known large value and revenue producing character of the property involved, placed no reasonably possible liability on him.

If, as the petitioner says, the interest in said property so acquired by him and his associates was compensation for personal services, then its fair market value at the time acquired was the cost thereof to them.

In such event, he and his associates would be entitled to have return of their cost in said property before they could have any income or gain therefrom, and the total revenues and income derived from said property during the year 1932 was less than its fair market value, being petitioner's cost therein, when acquired in 1931. Petitioner says therefore that it is error for the Commissioner to include any part of the revenues and income from said properties in the year 1932 in his gross income.

(2) By the contract between the petitioner in his representative capacity as trustee for himself and others and the Oklahoma City Company for the purchase of the property, it is provided that the Company shall receive one-half of the proceeds derived from all and every part of the property involved, either by income therefrom or gain on the sale thereof, until it had received the sum of $110,000, with interest thereon at the rate of six per cent (6%) per annum from March 19, 1931. The petitioner says that the right to receive this $110,000 represented a retained interest by the Company in the property conveyed and assigned, and was in substance and in fact a reserved or excepted interest in the conveyance and assignment thereof to the extent of $110,000. The interest in the property which that $110,000 represented never passed or belonged to or became the property of the petitioner and those whom he represented. None of said sum as derived from said property was his income, but at all times was the property and money and income of and belonged to the Oklahoma City Company, and petitioner, in collecting and receiving it into his hands and paying it over to the Oklahoma City Company, acted as the mere agency or channel through which the Company's retained interest in the property was converted into money and transmitted to it.

The same is true in respect of the $50,000 payment to the Oil Brokerage and Investment Company. The right to receive this sum out of one-half of the first money realized [fol. 46] from the property in whatever manner was part of the interest which it purchased from the Oklahoma City

Company for $50,000 paid in cash. No part of that $50,000 as realized from the property ever passed or belonged to the petitioner or in any way became his money. In collecting and receiving it into his hands and paying it over to the Oil Brokerage and Investment Company, he was merely the agency of that company through which it realized on its right to receive said sum.

During the year 1931 the total revenue and proceeds derived from the property involved was $55,833.17, of which one-half belonged and was paid to and received by the Oklahoma City Company, and the other one-half, less $1,612.49 of expense, was paid to and received by the Oil Brokerage and Investment Company, or its successor, the Winkler-Koch Royalty Company. During the year 1932 the total revenue and proceeds derived from the property was $81,547.15, of which one half belonged and was paid to and received by the Oklahoma City Company. Out of the remaining one half, being $40,773.57, there was deducted $713.47 of expense and from the remaining $40,060.11, the Winkler-Koch Royalty Company, successor to the Oil Brokerage and Investment Company, received $23,695.91 to complete the repayment to it of the $50,000 with which it had purchased its interest in the property. This left a balance out of said remaining half of $16,364.20, of which 50% went to Winkler-Koch Royalty Company, and 22½% was gross income to the petitioner, in event his contention made under assignment of error IV (1) and V (1), supra, is denied and it is determined and held that he had no cost in said property. This amount of gross income would be subject to proper adjustments for depletion and also, by reason of capital expenditures in development and operation of the property, for depreciation. Upon making these adjustments, the amount of petitioner's net taxable income from said joint venture is determined to be $1,964.93. On his return he included $2,887.29 of income from this source. Therefore, since he has already overstated said income on his return, the action of the Commissioner in including said additional sum of $11,276.39 as derived from the said joint venture is erroneous.

(3) In 1931 an agreement was made by petitioner for himself and as agent for J. Steve Anderson and R. Olsen [fol. 47] with a group of persons, fifteen in number and herein referred to as investors, whereby the investors were to furnish him money with which to buy oil properties and

in-oil payments and were to receive out of the first net income from properties or in-oil payments purchased all money furnished by them. Then when they had thus received repayment of all money advanced the properties and in-oil payments were to belong one-half to the investors, apportioned among them according to the amount of money contributed by each, and one-half to petitioner, J. Steve Anderson and R. Olsen in the proportions of 45% to petitioner, 45% to J. Steve Anderson, and 10% to R. Olsen, and petitioner was to hold the legal title to said properties and in-oil payments in trust for all the other parties according to their respective interests therein.

The investors advanced to the petitioner $17,500.00 for the enterprise, which is termed by the Commissioner the Prichard-Olsen Joint Venture. During the year 1932 net income from investments of the venture amounted to $15,565.58, according to the Revenue Agent's report on which the Commissioner's Notice of Deficiency is based in part. This was all payable and was paid to the investors, according to the original agreement, and was insufficient to repay the sum advanced by them. The petitioner realized no gain whatever from this source in the taxable year. The action of the respondent in including in his income the sum of $3,501.68, computed as 22½% of $15,565.58, as gain from this venture is erroneous.

VI

The petitioner says that the determination of his income and deductions for the year 1932, as set forth in said Notice of Deficiency, Exhibit A hereto, is correct except in respect of the matters hereinabove alleged to constitute error, and that if and when the errors alleged in this petition are sustained in whole or in part by the decision of the Board, then his tax liability may be ascertained and determined by making whatever corrections or changes, if any, in his net income for said year as shown by said Notice of Deficiency may be required by the Board's decision. This may be done under Rule 50.

Wherefore, the petitioner prays that the Board may hear this proceeding and determine that the errors assigned herein are well taken and should be sustained and granted, [fol. 48] and that the petitioner's net income and tax liability may be redetermined after a correction of the errors

herein assigned in accordance with the decision of the Board in this proceeding.

Chas. H. Garnett, Attorney for Petitioner, 608 Hales Building, Oklahoma City, Oklahoma.

Duly sworn to by L. H. Prichard. Jurat omitted in printing.

EXHIBIT "A" TO PETITION

Jul. 30, 1936.

IT:AR:E-1.
JF-90D.

Mr. L. H. Prichard, Ramsey Tower, Oklahoma City, Oklahoma.

SIR:

You are advised that the determination of your income tax liability for the taxable year 1932 discloses a deficiency of $1,918.60 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested [fol. 49] to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, by (Signed) W. T. Sherwood, Acting Deputy Commissioner.

Enclosures: Statement, Form 870.

JF/LEK-1.

Statement

IT:AR:E-1

In re Mr. L. H. Prichard, Ramsey Tower, Oklahoma City, Oklahoma

Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1932	$3,111.47	$1,192.87	$1,918.60

The report covering the examination of your accounts and records as made by the internal revenue agent in charge, Oklahoma City, Oklahoma, for the year 1932, has been reviewed and approved by this office.

The following changes have been made in your tax liability:

Net income reported on return		$16,711.50
Add:		
1. Increase in royalty income		12,684.78
Total		$29,396.28
Deduct:		
2. Depletion on Canfield royalty	$355.51	
3. Increase in contributions	563.41	
		918.92
Net income adjusted		$28,477.36

Computation of Tax

Net income adjusted		$28,477.36
Less:		
Personal exemption and credit for dependents		3,300.00
Net income subject to normal tax		$25,177.36
Normal tax at 4% on $4,000.00		$160.00
Normal tax at 8% on $21,177.36		1,694.19
Surtax on $28,477.36		1,257.28
		$3,111.47
Total tax, account 212508	$1,168.50	
Tax previously assessed May, 1934—510047	24.37	
		1,192.87
Deficiency		$1,918.60

Explanation of Changes

1. In-oil payments received in connection with the Patterson Deal and oil properties of the Prichard-Olsen Joint Venture not reported have been included as taxable income in accordance with the decision rendered in the Comar Oil Company case, 24 United States Board of Tax Appeals, 688, affirmed in the Circuit Court of Appeals, 64 Fed. (2d) 963.

2. Depletion based on cost has been allowed on the Canfield Button royalty.

3. Contribution deduction, based on 15 per cent of the net income without the benefit of the deduction, has been increased because of the increase in income.

A letter of final determination is being issued to comply with the request of your attorney, Mr. T. H. Marshall.

[fol. 50] A copy of this letter has been mailed to your representative, Mr. T. H. Marshall, 1000 Ramsey Tower, Oklahoma City, Oklahoma, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

[fol. 51] Before United States Board of Tax Appeals

Answer—Filed Nov. 17, 1936

Comes Now the respondent by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and for answer to the petition of the above-named taxpayer, admits and denies as follows:

I. Admits the allegations contained in Paragraph I of the petition.

II. Admits the allegations contained in Paragraph II of the petition.

III. Admits the allegations contained in Paragraph III of the petition.

IV. (1) to (3), incl. Denies that the Commissioner erred as alleged in sub-paragraphs (1) to (3), inclusive, of Paragraph IV of the petition.

V. (1) to (3), incl. Denies the allegations contained in sub-paragraphs (1) to (3), inclusive, of Paragraph V of the petition.

Denies each and every material allegation of fact contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) Herman Oliphant, General Counsel for the Department of the Treasury. Of Counsel: William E. Davis, Stanley B. Anderson, Special Attorneys, Bureau of Internal Revenue.

Received November 17, 1936. U. S. Board of Tax Appeals.

[Memorandum findings of fact and opinion and petitioner's exhibits 1, 2 and 3 appear in identical form at page 14 of the printed record and are therefore omitted here.]

[fol. 52] [Petitioner's motion for vacation of findings of fact and opinion and for reconsideration and redecision appears in identical form at page 28 of the printed record and is therefore omitted here.]

BEFORE UNITED STATES BOARD OF TAX APPEALS

DECISION

Pursuant to the Board's Memorandum Findings of Fact and Opinion entered August 16, 1938, the respondent, on September 7, 1938, filed a proposed computation which was not contested by the petitioner at the hearing on September 28, 1938. Therefore, it is

Ordered and Decided, that there is a deficiency for the year 1932 in the amount of $1,831.10.

(Signed) J. E. Murdock, Member, United States Board of Tax Appeals.

Entered Oct. 10, 1938.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

PETITION FOR REVIEW OF FINDINGS OF FACT, OPINION, DECISION AND JUDGMENT OF UNITED STATES BOARD OF TAX APPEALS IN THE CASE OF L. H. PRICHARD VS. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT, B. T. A. DOCKET NO. 86,969—Filed Dec. 30, 1938

To the Honorable Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

Now comes L. H. Prichard by Chas. H. Garnett, his attorney, and respectfully shows unto the court that:

I

The petitioner, herein sometimes referred to as the taxpayer, is a citizen and resident of Oklahoma County in the State of Oklahoma and his address is Ramsey Tower, Oklahoma City, Oklahoma.

The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, Guy T. Helvering, herein sometimes referred to as the Commissioner.

The taxpayer filed his income tax return for the calendar year 1932 with the Collector of Internal Revenue for the District of Oklahoma, whose office is located within the judi- [fol. 53] cial circuit of the United *of the United* States Circuit Court of Appeals for the Tenth Circuit wherein the taxpayer also resides.

II

The Commissioner determined a deficiency in income taxes against the taxpayer of $1,918.60 for the year 1932 and on July 30, 1936, in accordance with the provisions of the applicable statute, sent the taxpayer by registered mail a notice of said deficiency.

Within ninety days thereafter the taxpayer filed his appeal, in the form of a petition for review of the determination of said deficiency as set forth in said notice of deficiency, with the United States Board of Tax Appeals. The case was in due course tried before the Board and submitted for its decision, and on August 16, 1938, the Board promulgated its findings of fact and opinion therein, and on October 10, 1938, entered its judgment and final order

of redetermination wherein and whereby it ordered and decided that there was a deficiency of $1,831.10 in the taxpayer's income tax for 1932.

III

The determination by the Commissioner of the deficiency in taxpayer's income tax for 1932 arose out of and was based upon the following briefly outlined state of facts:

In 1931 petitioner, acting for himself and J. Steve Anderson and R. Olsen jointly, contracted to purchase and purchased from Oklahoma City Company, a corporation, certain property and property rights consisting of fee title to real estate, oil and gas royalty interests in real estate and the right to receive in-oil payments out of oil and gas production from real estate, according to the terms and conditions of a written contract to which reference may be made for a fuller statement. The title to the property and property rights thus acquired was taken and held by petitioner in the proportion of 45% to himself, 45% to Anderson, and 10% to Olsen, according to a written agreement between them. The contract for the purchase of the property and property rights provided for payment of a cash consideration of $50,000 and that the seller should receive one-half of all proceeds derived from oil and gas produced from the property or from the sale of fee title to any of the real estate until it had received the additional sum of $110,000 with 6% interest thereon from the date of the contract, and [fol. 54] that the seller should have a first lien and claim against one-half of all of the oil and gas production and the fee interest in the real estate from the proceeds of which said sum was payable until it was fully paid.

During 1932 the gross sum of $81,547.15 was received by petitioner from oil and gas production and in-oil payments from the property, and one-half thereof was paid to Oklahoma City Company in accordance with the terms of the contract. No part of the sum paid over to Oklahoma City Company was included in income on petitioner's tax return. The Commissioner determined that all of the $81,547.15 was gross income to Anderson, Olsen and petitioner in the proportions stated above, and included the petitioner's proportion thereof in his income and based the determination of a deficiency in tax thereon.

At the time petitioner was negotiating with Oklahoma City Company for the purchase of the property and prop-

erty rights in question, he was also negotiating with Oil Brokerage and Investment Company, a corporation, the name of which was later changed to Winkler-Koch Company, for the purchase by it of an interest therein. These negotiations resulted in the sale and assignment to Oil Brokerage Company of a half interest in all of the property and property rights acquired by petitioner from Oklahoma City Company, subject to the terms and conditions of his contract with that company, for the price and consideration of $50,000 in cash, but with the provision that Oil Brokerage Company should have and receive all revenues of every kind realized from the property which were payable to him under his agreement with Oklahoma City Company until it had received $50,000, and with the further provision that in event it failed to receive full $50,000 from such revenues, then he would pay half of its loss.

In 1931 Oil Brokerage Company received part of the $50,000 from the specified revenues and in 1932 received the final payment thereon of $23,695.91. The petitioner did not include in income on his tax return any part of the above amount paid to Oil Brokerage Company. The Commissioner in determining the deficiency involved included 45% thereof in petitioner's income.

After Oil Brokerage Company had received the final payment of $23,695.91 out of the specified revenues purchased [fol. 55] under its contract, there remained the sum of $16,364.20 out of the half of the proceeds derived from the properties in 1932 which went to petitioner under his contract with Oklahoma City Company. One-half of this, or $8,182.10, was paid to Oil Brokerage Company, but did include 45% of the like sum divided among Anderson, Olsen and himself. The Commissioner in determining the deficiency involved included 45% of said sum of $8,182.10 paid to Oil Brokerage Company in petitioner's income.

The action of the Commissioner in including in petitioner's income 45% of the payments of money derived from the properties involved which were retained by and payable to Oklahoma City Company and those which were acquired by and payable to Oil Brokerage Company was assigned as error by the petitioner before the Board of Tax Appeals.

In the findings of fact, opinion and final decision of the Board above referred to, the Commissioner's contention is upheld and all of the income from the property and property rights involved during 1932 is deemed and held to be

income to Anderson, Olsen and petitioner in the percentages above mentioned, and the deficiency in tax adjudged against petitioner for said year is based thereon.

IV

The petitioner says that in the record and proceedings before the Board of Tax Appeals and in its opinion, decision and final order of redetermination as rendered and entered, manifest error occurred and intervened to the prejudice of the petitioner, and he assigns the following errors and each of them and avers that these occurred in the said record, proceedings, findings of fact, opinion, decision and final order of redetermination, and that upon these he relies to reverse to said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to-wit:

(1) The Board of Tax Appeals erred in that its findings of fact in respect of the source from which derived, the ownership, apportionment and payment over of the gross proceeds derived and realized from said property and property rights in 1932 is not supported by any evidence in the record and is contrary to the evidence.

(2) The Board of Tax Appeals erred in holding that the [fol. 56] half of the gross proceeds derived and realized in 1932 from oil and gas production and from in-oil payments from the property and property rights involved which was payable and was paid to Oklahoma City Company was income to Anderson, Olsen, and petitioner.

(3) The Board of Tax Appeals erred in refusing to hold that no part of the gross proceeds realized and derived in 1932 from the property and property rights involved which were payable and were paid to Oklahoma City Company was income to Anderson or Olsen or petitioner or any of them.

(4) The Board of Tax Appeals erred in holding that that part of the half of the gross proceeds derived and realized from said property and property rights in 1932 and which were paid to Oil Brokerage Company in final payment of the $50,000 due it by contract, was income to Anderson, Olsen and petitioner.

(5) The Board of Tax Appeals erred in refusing to hold that no part of the gross proceeds derived and realized from said property and property rights in 1932 which were payable and were paid to Oil Brokerage Company in final

payment of the $50,000 due it by contract was income to Anderson or Olsen or petitioner or any of them.

(6) The Board of Tax Appeals erred in holding that all of the half of the gross proceeds derived and realized from said property and property rights in 1932 remaining after Oil Brokerage Company had received payment in full of the $50,000 payable to it by contract out of such one-half thereof, was income to Anderson, Olsen and petitioner.

(7) The Board of Tax Appeals erred in refusing to hold that only one-half of that part of the half of the gross proceeds derived and realized from said property and property rights in 1932 remaining after Oil Brokerage Company had been paid in full the $50,000 payable to it therefrom by contract was income to Anderson or Olsen or petitioner or any of them.

(8) The Board of Tax Appeals erred in determining that there was a deficiency in petitioner's income tax for the year 1932 in the amount of $1,831.10 and rendering a judgment therefor.

(9) The Board of Tax Appeals erred in not determining [fol. 57] and adjudging that there was no deficiency in petitioner's income tax for 1932.

Wherefore, the petitioner asks that a transcript of the proceedings before the Board of Tax Appeals be prepared in accordance with law and the rules of the United States Circuit Court of Appeals for the Tenth Circuit and transmitted to the clerk of said court for filing; that appropriate action be taken by said court to the end that the errors complained of herein may be reviewed and corrected; that the said decision of the said Board be reversed and set aside and the cause remanded to the Board with directions to conform its final order, decision and judgment to the law applicable as declared by said court; and that the petitioner have such further or other and different relief in the premises as shall be lawful, just and proper.

Chas. H. Garnett, 608 Hales Building, Oklahoma City, Oklahoma, Attorney for Petitioner.

Duly sworn to by Chas. H. Garnett. Jurat omitted in printing.

[Notice of filing petition for review appears in identical form at page 38 of the printed record and is therefore omitted here.]

[Praecipe for record appears in identical form at page 38 of the printed record and is therefore omitted here.]

[fol. 58] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 59] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 86970

R. OLSEN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

[Appearances and docket entries appear in identical form at page 1 of the printed record and are therefore omitted here.]

PETITION—Filed Oct. 19, 1936

The above named petitioner hereby petitions for redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency dated July 30, 1936, and as a basis of this proceeding alleges as follows:

I

The petitioner is a citizen and resident of the State of Oklahoma and his post office address is Ramsey Tower, Oklahoma City, Oklahoma.

II

The Notice of Deficiency, a copy of which is attached hereto and marked Exhibit A, was mailed to petitioner on July 30, 1936.

III

The taxes in controversy are income taxes for the calendar year 1932 and the amount involved and in dispute is $337.77.

IV

The determination of the deficiency set forth in said Notice of Deficiency is based upon the following errors:

(1) The inclusion in income of alleged profits and income in the sum of $2,505.85 arising out of petitioner's interest in certain property acquired from the Oklahoma City Com- [fol. 60] pany in 1931 and owned and operated throughout 1932 by Winkler-Koch Royalty Company, a corporation, L. H. Prichard, J. Steve Anderson and petitioner, who are said by the Commissioner to constitute a joint venture, for that petitioner's interest in said joint venture was acquired as compensation for personal services rendered by him and his agent and trustee, L. H. Prichard, in 1931, and its then fair market value was its cost, and no income above such cost was realized by petitioner therefrom in 1932.

(2) The inclusion in income of an additional $2,505.85 as petitioner's alleged distributive share in the income and profits of the joint venture referred to in the preceding paragraph, for that, if there were any net profits in said joint venture in which petitioner was entitled to share, the amount thereof was less than that included in income on his return.

(3) The inclusion in income of $778.48 alleged to have been petitioner's distributive share of the net profits of the Prichard-Olsen joint venture, for that said joint venture had no profits in said year.

(4) The disallowance of the deduction from income of commissions in the sum of $1,121.25 paid on purchases of securities and commissions in the sum of $1,057.25 paid on the sales of securities, for that the petitioner was engaged in the business of buying and selling securities and the payment of said commissions was part of the ordinary expense of carrying on his said business and deductible as such.

(5) The disallowance of the deduction from income of losses sustained on the sale of assets and by theft during the taxable year in the sum of $2,560.46.

V

The facts upon which the petitioner relies as the basis of this proceeding and in support of the foregoing assignments of error are as follows:

(1) For some time prior to March 19, 1931, L. H. Prichard, a business associate of J. Steve Anderson and Petitioner, and acting as agent and trustee for himself and them, carried on negotiations with the Oklahoma City Company, a corporation, of Oklahoma City, Oklahoma, for the pur- [fol. 61] chase of a number of items of property consisting of real estate in fee, royalty interests or mineral rights in real estate, interests in the working interest or leasehold interest in oil and gas leases, and rights to receive various sums of money to be paid out of oil and gas to be produced from oil and gas properties, being what is commonly known as in-oil payments. All of these parcels and kinds of property were situated in Oklahoma City, in the County and State of Oklahoma, and were generally classed as oil properties, for that they either had or were believed to have oil value. J. Steve Anderson and petitioner were to assist and did assist said L. H. Prichard, who acted as agent and trustee for them as well as for himself, in carrying on said negotiations, and it was understood and agreed among them that whatever contract might be entered into and transactions consummated and properties acquired in the name of L. H. Prichard through such negotiations would belong to the three of them in the proportion of 45% to J. Steve Anderson, 45% to L. H. Prichard, and 10% to petitioner. As a result of the negotiations mentioned, the Oklahoma City Company agreed to sell, convey and assign all the property in question for the consideration of $50,000 to be paid in cash, and $110,000 to be paid with interest out of one-half of the proceeds derived from all oil and/or gas produced, saved and sold from the property, and one-half of the proceeds derived from the sale of any part of it. Thereupon L. H. Prichard opened negotiations with the Oil Brokerage and Investment Company, a corporation of Wichita, Kansas, the name of which was later changed to Winkler-Koch Royalty Company already referred to herein, for the purchase by the latter of an interest in said property offered for sale by the Oklahoma City Company. These negotiations resulted in an agreement between L. H. Prichard and said Oil Brokerage and Investment Company that it would

pay the $50,000 down payment in cash required to be paid to the Oklahoma City Company, and in consideration thereof should have the right to receive and be paid back that $50,000 out of one-half of any and all revenues of every kind and description that might be realized from the property, and thereafter should receive one-fourth of such revenues until the sum of $110,000, required to be paid to the Oklahoma City Company in accordance with its proposal out of one-half of all revenues from the property, should be fully paid [fol. 62] from that source, and thereafter should receive one-half of all revenues of every kind and character that might be realized from the property.

On his part, the said L. H. Prichard agreed to consummate the purchase of the property from the Oklahoma City Company on the terms offered and to take title to it in his name and then to assign to the Oil Brokerage and Investment Company the interest therein that it would be entitled to receive under the agreement with it, and further agreed personally to stand one-half of any loss that it might sustain in event it did not receive back the full $50,000 paid in cash out of the portion assigned to it in the agreement of the revenues from the property. Pursuant to this agreement with the Oil Brokerage and Investment Company, L. H. Prichard, under date of March 19, 1931, entered into a written contract and agreement with the Oklahoma City Company for the purchase of the property in question on the terms previously proposed. Then, under date of March 23, 1931, L. H. Prichard made written assignment to the Oil Brokerage and Investment Company of the interest in the property which it was to acquire under the previous agreement between it and said L. H. Prichard, and also made written assignment to J. Steve Anderson and petitioner of their interests therein. Thereupon the Oil Brokerage and Investment Company paid the $50,000 down payment in cash to the Oklahoma City Company, or to L. H. Prichard for payment to that company, and thereupon the Oklahoma City Company executed and delivered to L. H. Prichard valid instruments conveying to him the various rights and interests in property, and the parcels of property, specified in the contract, together with abstracts of title to the real estate involved and contracts and title papers for the leasehold interests and in-oil payments, and thereupon L. H. Prichard took possession of all of said property and property rights and held the title

thereto in trust for himself and for J. Steve Anderson, this petitioner, the Oil Brokerage and Investment Company and the Oklahoma City Company, according to his and their respective interests therein.

Thereafter L. H. Prichard collected all income from the property, sold and conveyed certain portoins of it and distributed the revenues and proceeds in accordance with the [fol. 63] rights and interests of the various parties therein as above set forth.

Upon this state of facts, the petitioner says that all and whatever interest was acquired by L. H. Prichard in said property for himself and his said associates, J. Steve Anderson and this petitioner, was received and realized for his services and theirs in negotiating, consummating and carrying out the said contracts with the Oklahoma City Company and the said contract with the Oil Brokerage and Investment Company, for that he never at any time invested any money or other thing of value of his own or of his said associates, J. Steve Anderson and this petitioner, in the property or the enterprise, or any phase of it, and never agreed, promised or in any way obligated himself to pay any money or thing of value for or on account of the interest which he acquired in said property for himself and his said associates other than that he, for himself and his said associates, agreed to stand one-half of whatever loss the Oil Brokerage and Investment Company might sustain in event it did not receive back the $50,000 cash payment made by it from the source stipulated in the agreement. But this obligation was secondary and contingent, and, because of the known large value and revenue producing character of the property involved, placed no reasonably possible liability on him and his said associates.

If, as the petitioner says, the interest in said property so acquired by L. H. Prichard for himself and J. Steve Anderson and this petitioner was compensation for personal services performed by him and them, or by him for them, then its fair market value at the time acquired was the cost thereof to them. In such event, he and his associates, including this petitioner, would be entitled to have return of their cost in said property before they could have any income or gain therefrom, and the total revenues and income derived from said property during the year 1932 were less than its fair market value, which is the cost of petitioner and associates therein when acquired in 1931. The Commissioner

has included the sum of $2,505.85 in petitioner's income as alleged profits accruing to him from said joint venture and coming from said properties. Petitioner says that it is error for the Commissioner to include any part of the revenues [fol. 64] and income from the said properties in the year 1932 in his gross income.

(2) By the contract between L. H. Prichard, in his representative capacity as trustee for himself and J. Steve Anderson and this petitioner, and the Oklahoma City Company for the purchase of the property, it is provided that the Company should receive one-half of the proceeds derived from all and every part of the property involved either by income therefrom or gain on the sale thereof until it received the sum of $110,000, with interest thereon at the rate of 6% per annum from March 19, 1931. The petitioner says that the right to receive this $110,000 represented a retained interest by the Company in the property conveyed and assigned and was in substance and in fact a reserved or excepted interest in the conveyance and assignment thereof to the extent of $110,000. The interest in the property which that $110,000 represented never passed or belonged to or became the property of L. H. Prichard and those whom he represented. None of said sum as derived from said property was his or their income, but at all times was the property and money and income of and belonged to the Oklahoma City Company, and L. H. Prichard, in collecting and receiving it into his hands and paying it over to the Oklahoma City Company, acted as the mere agency or channel through which the Company's retained interest in the property was converted into money and transmitted to it.

The same is true in respect of the $50,000 payment to the Oil Brokerage and Investment Company. The right to receive this sum out of one-half of the first money realized from the property in whatever manner was part of the interest which it purchased from the Oklahoma City Company for $50,000 paid in cash. No part of that $50,000 as realized from the property ever passed or belonged to L. H. Prichard individually or as trustee and agent for J. Steve Anderson and this petitioner or in any way became the money of either of them. In collecting and receiving it into his hands and paying it over to the Oil Brokerage and Investment Company he was merely the agency of that company through which it realized on its right to receive said sum.

During the year 1931 the total revenue and proceeds derived from the property involved was $55,833.17, of which one-half belonged and was paid to and received by the Okla- [fol. 65] homa City Company, and the other one-half, less $1,612.49 of expense, was paid to and received by the Oil Brokerage and Investment Company or its successor, the Winkler-Koch Royalty Company. During the year 1932 the total revenue and proceeds derived from the property was $81,547.15, of which one-half belonged and was paid to and received by the Oklahoma City Company. Out of the remaining one-half, being $40,773.57, there was deducted $713.47 of expense and from the remaining $40,060.11 the Winkler-Koch Royalty Company, successor to the Oil Brokerage and Investment Company, received $23,695.91 to complete the repayment to it of the $50,000 with which it had purchased its interest in the property. This left a balance out of said remaining half of $16,364.20, of which fifty per cent went to Winkler-Koch Royalty Company and five per cent was gross income to the petitioner, in event his contention made under assignments of error IV(1) and V(1), supra, is denied and it is determined and held that he had no cost in said property. This amount of gross income would be subject to proper adjustments for depletion, and also, by reason of capital expenditures in development and operation of the property, for depreciation. Upon making these adjustments, the amount of petitioner's net taxable income from said joint venture is determined to be $436.65. On his return he included $703.33 of income from this source. The Commissioner has included the additional sum of $2,505.85 as income from this source in determining the deficiency here involved. The petitioner says that since he has already overstated such income on his return, the action of the Commissioner in including said additional sum of $2,505.85 as derived from the said joint venture is erroneous.

(3) In 1931 an agreement was made by L. H. Prichard, for himself and as agent and trustee for J. Steve Anderson and petitioner, with a group of persons, fifteen in number and herein referred to as investors; whereby the investors were to furnish L. H. Prichard with money with which to buy oil properties and in-oil payments and were to receive out of the first net income from oil properties or in-oil payments purchased all money furnished by them. Then when they

had thus received repayment of all money advanced, the properties and in-oil payments were to belong one-half to the investors, apportioned among them according to the [fol. 66] amount of money contributed by each, and one-half to L. H. Prichard, J. Steve Anderson and petitioner, in the proportions of 45% to L. H. Prichard, 45% to J. Steve Anderson and 10% to petitioner, and L. H. Prichard was to hold the legal title to said properties and in-oil payments in trust for all the other parties according to their respective interests therein.

The investors advanced to L. H. Prichard $17,500 for the enterprise, which is termed by the Commissioner the Prichard-Olsen joint venture. During the year 1932 net income from investments of the venture amounted to $15,565.58, according to the Revenue Agent's report on which the Commissioner's Notice of Deficieney is based in part. This was all payable and was paid to the investors according to the original agreement and was insufficient to repay the sum advanced by them. The petitioner realized no gain whatever from this source in the taxable year. The Commissioner has included in petitioner's income the sum of $778.48, computed as 5% of $15,565.58, as gain from this venture. The petitioner says that this is erroneous.

(4) During the taxable year petitioner was actively engaged in the purchase and sale of securities on stock exchanges through brokers employed for that purpose. The number of his transactions of this character amounted to approximately two hundred, and they constituted an important part of the business carried on by him during the year. In these transactions he paid his brokers as commissions on purchases of securities the sum of $1,121.25, and on sales of securities the sum of $1,057.25. These commissions, in the total sum of $2,178.50, the Commissioner has disallowed as a deduction on the ground that they are part of the cost of the securities purchased and can be taken into account only in determining the question of gain or loss on the sale of them, and that, since the petitioner in fact sustained a loss of $11,677.13 on his purchases and sales of securities, exclusive of said commissions paid, and since he is not a dealer within the provisions of Sec. 23(r) (3) of the Revenue Act of 1932, he is not permitted to take a deduction of said losses by reason of the provisions of Sec. 23(r) (1) of said Act. The petitioner says that this is erroneous, for that the commissions paid as set forth above are ordinary

business expense and deductible as such, and particularly that the commissions paid on the sales of securities can not possibly be classified as cost of property sold.

[fol. 67] (5) During the year the petitioner sold various mineral or royalty interests in real estate upon which he sustained a loss, and also suffered a loss by theft, all of which, amounting to the total sum of $2,560.46, the Commissioner has disallowed as a deduction from income. The properties, with cost, sale price and amount of loss, are as follows:

Property	Cost	Sale Price	Loss
Royalty No. 145	$600.00	$5.00	$595.00
Royalty No. 48	372.13	3.33	368.80
Royalty No. 138	800.00	5.00	795.00
Loss on buildings and fences stolen			901.66
Total Loss			$2,560.46

Petitioner says he is entitled to the allowance of the above sum as a deduction from income and that the Commissioner has erroneously denied his right thereto.

VI

The petitioner says that the determination of his income and deductions for the year 1932, as set forth in said Notice of Deficiency, Exhibit A hereto, is correct except in respect of the matters hereinabove alleged to constitute error, and that if and when the errors alleged in this petition are sustained in whole or in part by the decision of the Board, then his tax liability may be ascertained and determined by making whatever corrections or changes, if any, in his net income for said year, as shown by said Notice of Deficiency, may be required by the Board's decision. This may be done under Rule 50.

Wherefore, the petitioner prays that the Board may hear this proceeding and determine that the errors assigned herein are well taken and should be sustained and granted, and that the petitioner's net income and tax liability may be re-determined after a correction of the errors herein assigned in accordance with the decision of the Board in this proceeding.

Chas. H. Garnett, Attorney for Petitioner, 608 Hales Building, Oklahoma City, Oklahoma.

Duly sworn to by R. Olsen. Jurat omitted in printing.

[fol. 68] EXHIBIT "A" TO PETITION

Jul. 30, 1936.

IT:AR:E-1.
JF-90D.

Mr. R. Olsen, Ramsey Tower, Oklahoma City, Oklahoma.

SIR:

You are advised that the determination of your income tax liability for the taxable year 1932 discloses a deficiency of $337.77 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, by (Signed) W. T. Wherwood, Acting Deputy Commissioner.

[fol. 69] Enclosures: Statement, Form 870.
JF/LEK-1.

Statement

IT:AR:E-1.

In re: Mr. R. Olsen, Ramsey Tower,
Oklahoma City, Oklahoma

Income Tax Liability.

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1932	$337.77	None	$337.77

The report covering the examination of your accounts and records as made by the internal revenue agent in charge, Oklahoma City, Oklahoma, for the year 1932, has been reviewed and approved by this office.

The following changes have been made in your tax liability:

Net income reported on return		$1,132.47
Overstated by .02		$1,132.45
Add:		
1. Increase in royalty income	$3,284.25	
2. Decrease in loss	2,607.29	
3. Deductions disallowed	2,151.75	8,043.29
Total		$9,175.74
Deduct:		
4. Decrease in rent income		44.94
Net income adjusted		$9,130.80

Computation of Tax

Net income adjusted	$9,130.80
Less:	
Personal exemption and credit for dependents	3,300.00
Net income subject to normal tax	$5,830.80
[fol. 70] Normal tax at 4% on $4,000.00	$160.00
Normal tax at 8% on $1,830.80	146.46
Surtax on $9,130.80	31.31
Total tax	$337.77
Tax previously assessed	None
Deficiency	$337.77

Explanation of Changes

1. In-oil payments received in connection with the Patterson Deal and oil properties of the Prichard-Olsen joint venture have been included as taxable income in accordance with the decision rendered in the Comar Oil Company case, 24 United States Board of Tax Appeals, 688 affirmed in the Circuit Court of Appeals, 64 Fed. (2d) 963.

2. Loss on sale of assets has been decreased by $2,607.29 for the following reasons:

Depletion previously sustained, of $39.60, in connection with royalty No. 281, has been considered in arriving at the profit from sale.

Royalty No. 145 sold for $5.00 was condemned prior to 1932 leaving a zero cost basis.

Fee No. 295 was lost through foreclosure and not through sale.

Royalty No. 48 was condemned prior to 1932, leaving a zero cost basis.

Loss from sale of royalty No. 138 was not substantiated as being a bona fide sale.

Loss from stolen buildings and fences was not allowed for this loss was not substantiated.

An adjustment of these items discloses a loss of $764.50 instead of $3,371.79, as shown on the return.

3. Depreciation on a business automobile was increased by $10.00 to provide for the remaining depreciation allowable.

Commissions paid on purchase and sale of securities which reflected a net loss have been disallowed as they are considered an integral part of the transactions resulting in a loss not deductible under section 23(r) of the Revenue Act of 1932.

[fol. 71] 4. Rent income has been decreased by the portion of the royalty from the Patterson Deal reported in these adjustments under royalties.

Depreciation deduction has been allowed for $603.33 based upon the cost as shown by your books and a rate of 5 per cent, which is considered a reasonable rate for these properties.

Repairs have been allowed for $339.05, instead of $254.05, as shown on the return.

The net adjustment results in loss of $44.94 from rents.

A letter of final determination is being issued to comply with the request of your attorney, Mr. T. H. Marshall.

A copy of this letter has been mailed to your representative, Mr. T. H. Marshall, 1000 Ramsey Tower, Oklahoma City, Oklahoma, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

BEFORE UNITED STATES BOARD OF TAX APPEALS

ANSWER—Filed November 17, 1936

Comes Now the respondent by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and for answer to the petition of the above-named taxpayer, admits and denies as follows:

I. Admits the allegations contained in Paragraph I of the petition.

II. Admits the allegations contained in Paragraph II of the petition.

III. Admits the allegations contained in Paragraph III of the petition.

IV. (1) to (5), incl. Denies that the Commissioner erred as alleged in sub-paragraphs (1) to (5), inclusive, of Paragraph IV of the petition.

V. (1) to (5), incl. Denies the allegations contained in subparagraphs (1) to (5), inclusive, of Paragraph V of the petition.

Denies each and every material allegation of fact contained in the petition not hereinbefore specifically admitted, qualified or denied.

[fol. 72] Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) Herman Oliphant, General Counsel for the Department of the Treasury.

Of Counsel: William E. Davis, Stanley B. Anderson, Special Attorneys, Bureau of Internal Revenue.

Received November 17, 1936, United States Board of Tax Appeals.

[Memorandum findings of fact and opinion and petitioner's exhibits 1, 2 and 3 appear in identical form at page 14 of the printed record and are therefore omitted here.]

[Petitioner's motion for vacation of findings of fact and opinion and for reconsideration and redecision appears in

identical form at page 28 of the printed record and is therefore omitted here.]

BEFORE UNITED STATES BOARD OF TAX APPEALS

DECISION

Pursuant to the Board's Memorandum Findings of Fact and Opinion entered August 16, 1938, the respondent on September 7, 1938, filed a proposed computation which was not contested by the petitioner at the hearing on September 28, 1938. Therefore, it is

Ordered and Decided, that there is a deficiency for the year 1932 in the amount of $329.80.

(Signed) J. E. Murdock, Member, United States Board of Tax Appeals.

Entered October 10, 1938.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

PETITION FOR REVIEW OF FINDINGS OF FACT, OPINION, DECISION AND JUDGMENT OF UNITED STATES BOARD OF TAX APPEALS IN THE CASE OF R. OLSEN VS. COMMISSIONER OF INTERNAL REVENUE, B. T. A. DOCKET NO. 86,970—Filed December 30, 1938

To the Honorable Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

[fol. 73] Now comes R. Olsen by Chas. H. Garnett, his attorney, and respectfully shows unto the court that:

I

The petitioner, herein sometimes referred to as the taxpayer, is a citizen and resident of Oklahoma County in the State of Oklahoma and his address is Ramsey Tower, Oklahoma City, Oklahoma.

The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, Guy T. Helvering, herein sometimes referred to as the Commissioner.

The taxpayer filed his income tax return for the calendar year 1932 with the Collector of Internal Revenue for the District of Oklahoma, whose office is located within the judicial circuit of the United States Circuit Court of Appeals for the Tenth Circuit wherein the taxpayer also resides.

II

The Commissioner determined a deficiency in income taxes against the taxpayer of $337.77 for the year 1932 and on July 30, 1936, in accordance with the provisions of the applicable statute, sent the taxpayer by registered mail a notice of said deficiency.

Within ninety days thereafter the taxpayer filed his appeal, in the form of a petition for review of the determination of said deficiency as set forth in said notice of deficiency, with the United States Board of Tax Appeals. The case was in due course tried before the Board and submitted for its decision, and on August 16, 1932, the Board promulgated its findings of fact and opinion therein, and on October 10, 1938, entered its judgment and final order of redetermination wherein and whereby it ordered and decided that there was a deficiency of $329.80 in the taxpayer's income tax for 1932.

III

The determination by the Commissioner of the deficiency in taxpayer's income tax for 1932 arose out of and was based upon the following briefly outlined state of facts:

In 1931 L. H. Prichard, acting for himself and J. Steve Anderson and the petitioner jointly, contracted to purchase and purchased from Oklahoma City Company, a corpora- [fol. 74] tion, certain property and property rights consisting of fee title to real estate, oil and gas royalty interests in real estate and the right to receive in oil payments out of oil and gas production from real estate, according to the terms and conditions of a written contract, to which reference may be made for a fuller statement. The title to the property and property rights thus acquired was taken and held by Prichard in the proportion of 45% to himself, 45% to Anderson, and 10% to petitioner, according to a written agreement between them. The contract for the purchase of the property and property rights provided for payment of a cash consideration of $50,000 and that the seller should

receive one-half of all proceeds derived from oil and gas produced from the property or from the sale of fee title to any of the real estate until it had received the additional sum of $110,000 with 6% interest thereon from the date of the contract, and that the seller should have a first lien and claim against one-half of all of the oil and gas production and the fee interest in the real estate from the proceeds of which said sum was payable until it was fully paid.

During 1932 the gross sum of $81,547.15 was received by Prichard from oil and gas production and in-oil payments from the property, and one-half thereof was paid to Oklahoma City Company in accordance with the terms of the contract. No part of the sum paid over to Oklahoma City Company was included in income on petitioner's tax return. The Commissioner determined that all of the $81,547.15 was gross income to Prichard, Anderson and petitioner in the proportions stated above, and included the petitioner's proportion thereof in his income and based the determination of a deficiency in tax thereon.

At the time Prichard was negotiating with Oklahoma City Company for the purchase of the property and property rights in question, he was also negotiating with Oil Brokerage and Investment Company, a corporation, the name of which was later changed to Winkler-Koch Company, for the purchase by it of an interest therein. These negotiations resulted in the sale and assignment to Oil Brokerage Company of a half interest in all of the property and property rights acquired by Prichard from Oklahoma City Company, subject to the terms and conditions of his contract with that company, for the price and consideration of $50,000 in cash, but with the provision that Oil Brokerage Company should have and receive all revenues of every kind realized [fol. 75] from the property which were payable to him under his agreement with Oklahoma City Company until it had received $50,000, and with the further provision that in event it failed to receive full $50,000 from such revenues, then Prichard would pay half of its loss.

In 1931 Oil Brokerage Company received part of the $50,000 from the specified revenues and in 1932 received the final payment thereon of $23,695.91. The petitioner did not include in income on his tax return any part of the above amount paid to Oil Brokerage Company. The Commissioner in determining the deficiency involved included 10% thereof in petitioner's income.

After Oil Brokerage Company had received the final payment of $23,695.91 out of the specified revenues purchased under its contract, there remained the sum of $16,364.20 out of the half of the proceeds derived from the properties in 1932 which went to Prichard under his contract with Oklahoma City Company. One-half of this, or $8,182.10, was paid to Oil Brokerage Company, and the other half was divided among Prichard, Anderson and petitioner in the agreed percentages. The petitioner did not include in income on his tax return any part of the above sum of $8,182.10 payable and paid to Oil Brokerage Company, but did include 10% of the like sum divided among Prichard, Anderson and himself. The Commissioner in determining the deficiency involved included 10% of said sum of $8,182.10 paid to Oil Brokerage Company in petitioner's income.

The action of the Commissioner in including in petitioner's income 10% of the payments of money derived from the properties involved which were retained by and payable to Oklahoma City Company and those which were acquired by and payable to Oil Brokerage Company was assigned as error by the petitioner before the Board of Tax Appeals.

In the findings of fact, opinion and final decision of the Board above referred to, the Commissioner's contention is upheld and all of the income from the property and property rights involved during 1932 is deemed and held to be income to Prichard, Anderson and petitioner in the percentages above mentioned, and the deficiency in tax adjudged against petitioner for said year is based thereon.

[fol. 76] IV

The petitioner says that in the record and proceedings before the Board of Tax Appeals and in its opinion, decision and final order of redetermination as rendered and entered, manifest error occurred and intervened to the prejudice of the petitioner, and he assigns the following errors and each of them and avers that these occurred in the said record, proceedings, findings of fact, opinion, decision and final order of redetermination, and that upon these he relies to reverse the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to-wit:

(1) The Board of Tax Appeals erred in that its findings of fact in respect of the source from which derived, the

ownership, apportionment and payment over of the gross proceeds derived and realized from said property and property rights in 1932 is not supported by any evidence in the record and is contrary to the evidence.

(2) The Board of Tax Appeals erred in holding that the half of the gross proceeds derived and realized in 1932 from oil and gas production and from in-oil payments from the property and property rights involved which was payable and was paid to Oklahoma City Company was income to Prichard, Anderson and petitioner.

(3) The Board of Tax Appeals erred in refusing to hold that no part of the gross proceeds realized and derived in 1932 from the property and property rights involved which were payable and were paid to Oklahoma City Company was income to Prichard, Anderson or petitioner or any of them.

(4) The Board of Tax Appeals erred in holding that that part of the half of the gross proceeds derived and realized from said property and property rights in 1932 and which were paid to Oil Brokerage Company in final payment of the $50,000 due it by contract, was income to Prichard, Anderson and petitioner.

(5) The Board of Tax Appeals erred in refusing to hold that no part of the gross proceeds derived and realized from said property and property rights in 1932 which were payable and were paid to Oil Brokerage Company in final payment of the $50,000 due it by contract was income to Prichard or Anderson or petitioner or any of them.

[fol. 77] (6) The Board of Tax Appeals erred in holding that all of the half of the gross proceeds derived and realized from said property and property rights in 1932 remaining after Oil Brokerage Company had received payment in full of the $50,000 payable to it by contract out of such one-half thereof, was income to Prichard, Anderson and petitioner.

(7) The Board of Tax Appeals erred in refusing to hold that only one-half of that part of the half of the gross proceeds derived and realized from said property and property rights in 1932 remaining after Oil Brokerage Company had been paid in full the $50,000 payable to it therefrom by contract was income to Prichard or Anderson or petitioner or any of them.

(8) The Board of Tax Appeals erred in determining that there was a deficiency in petitioner's income tax for the year 1932 in the amount of $329.86, and rendering a judgment therefor.

(9) The Board of Tax Appeals erred in not determining and adjudging that there was no deficiency in petitioner's income tax for 1932.

Wherefore, the petitioner asks that a transcript of the proceedings before the Board of Tax Appeals be prepared in accordance with law and the rules of the United States Circuit Court of Appeals for the Tenth Circuit and transmitted to the clerk of said court for filing; that appropriate action be taken by said court to the end that the errors complained of herein may be reviewed and corrected; that the said decision of the said Board be reversed and set aside and the cause remanded to the Board with directions to conform its final order, decision and judgment to the law applicable as declared by said court; and that the petitioner have such further or other and different relief in the premises as shall be lawful, just and proper.

Chas. H. Garnett, 608 Hales Building, Oklahoma City, Oklahoma, Attorney for Petitioner.

Duly sworn to by Chas. H. Garnett. Jurat omitted in printing.

[fol. 78] (Notice of filing petition for review appears in identical form at page 38 of the printed record and is therefore omitted here.)

(Praecipe for record appears in identical form at page 38, of the printed record and is therefore omitted here.)

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 79] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER OF SUBMISSION—September 6, 1939

These causes came on to be heard and were argued by counsel, Charles H. Garnett, Esquire, appearing for peti-

tioners, Joseph M. Jones, Esquire, appearing for respondent.

On motion, petitioners were granted leave to file a memorandum of additional authorities in this cause instanter, which was accordingly done.

Thereupon these causes were submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

Nos. 1870, 1871 and 1872—September Term, 1939

Charles H. Garnett for petitioners.

Joseph M. Jones, Sp. Asst. to the Atty. Gen. (James W. Morris, Asst. Atty. Gen., and Sewall Key, Sp. Asst. to the Atty. Gen., were with him on the brief) for respondent.

Before Phillips, Bratton and Huxman, Circuit Judges

OPINION—November 1, 1939

PHILLIPS, Circuit Judge, delivered the opinion of the court:

On March 19, 1931, Oklahoma City Company,[1] a corporation, entered into a written contract with L. H. Prichard. It recited that the Oklahoma Company was the owner of certain oil lands and royalties, working interests, and deferred oil payments in lands situated in Oklahoma County, Oklahoma; that the Oklahoma Company desired to sell and Prichard desired to purchase such properties. It provided that for and in consideration of the sum of ten dollars the Oklahoma Company should deliver to Prichard "good and valid instruments conveying to" Prichard the properties described in the contract, together with abstracts of title [fol. 80] thereto certified to date, and certified copies of the contracts covering the working interests and oil payments; that on approval of such abstracts and contracts by Prichard's attorneys, Prichard should pay to the Oklahoma Company $50,000 in cash; that the Oklahoma Company should have and receive one-half the proceeds received by Prichard from the sale of oil and gas from such properties, and from the sale of any of the lands conveyed to him, until the Okla-

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[1] Hereinafter referred to as the Oklahoma Company.

homa Company had received $110,000 with interest at the rate of six per cent per annum from the date of the contract; that the Oklahoma Company should have a first lien against one-half of all oil and gas produced from the properties and on one-half of the lands conveyed to secure the payment of the $110,000, but that such lien should not affect the other one-half interest in the oil and gas produced and the lands conveyed; that purchasers of oil and gas, including pipe line companies, should make payments directly to Prichard; that Prichard should make payment of one-half of the revenues derived from the sale of oil, gas, and lands at the end of 90-day periods commencing May 25, 1931, by depositing same to the credit of the Oklahoma Company in the Tradesmens National Bank of Oklahoma City, Oklahoma, with full, complete, accurate, and itemized statements of such receipts; and that a release should be placed in escrow in such bank, and upon the payment of the $110,000, with interest, it should be delivered by the bank to Prichard.

Immediately upon the execution of the contract the properties and interests described therein were conveyed and transferred to Prichard.

On March 23, 1931, Prichard entered into a contract with the Oil Brokerage and Investment Company,[2] a corporation, whereby, in consideration of $50,000, Prichard assigned and conveyed to the Investment Company an undivided one-half interest in the properties and interests described in the Prichard-Oklahoma Company contract. The contract with the Investment Company provided that it should receive all the revenues from such properties and interests payable to Prichard under the Prichard-Oklahoma Company contract until the Investment Company had received the sum of $50,000, and that after such sum had been paid the Investment Company and Prichard should each own an undivided one-half interest in such properties and interests, and that [fol. 81] Prichard should execute and deliver to the Investment Company good and sufficient instruments conveying to it an undivided one-half interest in such properties and interests. It further provided that in the event the revenues from such properties were not sufficient to reimburse the Investment Company for the $50,000 advanced by it, Prichard should pay to the Investment Company one-half of the

[2] Hereinafter referred to as the Investment Company.

difference between the revenues produced and the sum of $50,000. Prichard used the $50,000 obtained from the Investment Company to make the cash payment to the Oklahoma Company.

In the transactions, Prichard acted for himself and for Anderson and Olsen. Their respective shares in the properties and interests were set forth in a declaration of trust dated March 23, 1931, as follows: Prichard, 45 per cent; Anderson, 45 per cent; and Olsen, 10 per cent.

During the years 1931 and 1932 Prichard received all the proceeds from sales of oil and gas produced from the properties. The gross proceeds in 1931 amounted to $55,833.70. Prichard paid one-half of that amount to the Oklahoma Company and one-half to the Investment Company. The gross proceeds in 1932 were $81,547.15. Prichard paid one-half thereof to the Oklahoma Company, $23,695.91 to the Investment Company, and distributed the remainder as follows: Investment Company, 50 per cent; Anderson, 22½ per cent; Prichard, 22½ per cent; and Olsen, 5 per cent.

Prichard reported as income from the sale of oil and gas produced from the properties acquired by him from the Oklahoma Company for the year 1932, $3,165.19. Anderson reported the same amount. Each deducted an allowance for depletion. The record does not disclose the amount reported by Olsen. The Commissioner increased the amount of income and proposed deficiencies as follows: Anderson, $2,724.91; Prichard, $1,918.60; and Olsen, $337.77. The Board of Tax Appeals approved the determinations of the Commissioner. These are petitions to review the decisions of the Board.

Petitioners contend that the Oklahoma Company reserved a legal or equitable interest in one-half of the lands and interests transferred to Prichard to the extent of $110,000, with interest, and that the payments made to the Oklahoma Company were not income to petitioners.

It will be observed that the Prichard-Oklahoma Company [fol. 82] contract provided for the delivery to Prichard of good and valid instruments conveying to him the lands and interests described in the contract and made no provision for any reservation or exception in such instruments of conveyance; that the $110,000 was to be paid only out of proceeds derived by Prichard, both from the sale of oil and gas and from the sale of lands, and the contract made no

provision for any partial release by the Oklahoma Company as sales of land were made by Prichard; that it made no express reservation to the Oklahoma Company of one-half of the oil and gas produced from the properties and made no provision for payment directly to it of the proceeds derived from sales of one-half of the oil, gas, and land, but on the contrary provided that such payments should be made directly to Prichard and that at 90-day intervals he should pay the amount due the Oklahoma Company by depositing same to its credit in the Tradesmens National Bank. It will be observed further that the contract provided for the payment of interest, reserved a lien upon one-half of the oil and gas and upon a one-half interest in the land to secure the payment of $110,000, with interest, and provided for the delivery of a release when such sum with interest had been fully paid. These provisions are wholly inconsistent with an intent to reserve any interest in the Oklahoma Company other than a lien on the properties or the proceeds derived therefrom. The Oklahoma Company could not retain title to property and at the same time reserve a lien thereon. The case of Thomas v. Perkins, 301 U. S. 655, is distinguishable. There, Hammonds and Branson owned oil and gas leases on undeveloped lands in Texas which provided for a royalty of one-eighth. They assigned the leases to Faith Oil Company which, in taking the assignment, acted for itself to the extent of one-fourth and for Green and Perkins, principal owners of the stock of the company, to the extent of three-eighths each. Later, it transferred its interest to Perkins. The assignment provided for the payment of ten dollars cash and "$395,000.00 * * * out of the oil produced and saved from the * * * lands, and to be one-fourth of all the oil produced and saved." It further provided that the oil payments should be made directly to Hammonds and Branson, and that the $395,000 should be payable out of oil only and should not be a personal obligation of the assignee, its successors, or assigns. The instrument did not purport to reserve a lien. The court said:

[fol. 83] "The provisions for payment to assignors in oil only, the absence of any obligation of the assignee to pay in oil or in money, and the failure of assignors to take any security by way of lien or otherwise unmistakably show that they intended to withhold from the operation of the grant

one-fourth of the oil to be produced and saved up to an amount sufficient when sold to yield $395,000."

Thus, it will be observed that in Thomas v. Perkins, supra, no lien was reserved and payments were to be made directly by the pipe line company to Hammonds and Branson, whereas in the instant case, an unqualified conveyance was made, a lien was reserved, the right of Prichard to sell and convey was implied, and the proceeds derived from sales were to be paid directly to Prichard.

We conclude that the Oklahoma Company made no reservation of title, but merely provided for the payment of $110,000, with interest, out of one-half of the funds received by Prichard from the sale of oil, gas, and lands and reserved a lien on one-half of the oil and gas produced and on one-half the land to secure such payment. It follows that the proceeds derived by Prichard from the sale of oil and gas were income to petitioners.[3]

Under the contract between the Investment Company and Prichard the Investment Company advanced $50,000 to make the cash payment to the Oklahoma Company. the Investment Company was to receive one-half of the income from the properties until it was reimbursed for the advance, and Prichard assumed a personal obligation to the Investment Company to the extent of $25,000 of the amount advanced by it. The essence of the transaction was that the Investment Company paid $25,000 of the cash payment to the Oklahoma Company and advanced an additional $25,000 to Prichard. It follows that $25,000 of the amount of the proceeds paid to the Investment Company discharged a personal obligation of Prichard, and was income to petitioners.[4]

If the transaction be regarded as a sale by Prichard to the Investment Company for $25,000 of one-half of the lands and interests, and a loan to Prichard of $25,000, then [fol. 84] Prichard received the exact amount which he paid for such one-half and realized no income therefrom.

Counsel for the government admit that $25,000 of the $50,000 paid to the Investment Company was not taxable

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[3] Comar Oil Company v. Burnet, 8 Cir., 64 F. 2d 965, 966; Helvering v. Elbe Oil Land Company, 303 U. S. 372.

[4] Reynolds v. McMurray, 10 Cir., 69 F. 2d 843.

against petitioners and assert that in fact it was so treated by the Board. On the other hand, the petitioners assert that the full $50,000 was in fact improperly taxed as income to them. We agree that $25,000 of the $50,000 was not taxable to petitioners, but whether it was so taxed we are unable to determine from this record.

Remanded with instructions to the Board to determine whether more than $25,000 of the amount paid to the Investment Company was assessed to petitioners, and in the event it was, to make redeterminations in accordance with this opinion. The decisions in all other respects are Affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

JUDGMENT—November 1, 1939

These causes came on to be heard on the transcripts of the record from the United States Board of Tax Appeals and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that these causes be and the same are hereby remanded with instructions to the said United States Board of Tax Appeals to determine whether more than $25,000.00 of the amount paid to the Oil Brokerage and Investment Company was assessed to petitioners, and in the event it was, to make a redetermination in accordance with the opinion of this court; and that the decisions of the said Board in all other respects be and the same are hereby affirmed.

(On December 11, 1939, the mandates of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, were issued to the United States Board of Tax Appeals.)

[fol. 85] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 86] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1939

No. 682

ORDER ALLOWING CERTIORARI—Filed March 4, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 87] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1939

No. 683

ORDER ALLOWING CERTIORARI—Filed March 4, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Chas. H. Garnett. File Nos. 44,089, 44,090. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 682. J. Steve Anderson, Petitioner, vs. Guy T. Helvering, Commissioner of Internal Revenue. Term No. 693. L. H. Prichard, Petitioner, vs. Guy T. Helvering, Commissioner of Internal Revenue. Petition for writs of certiorari and exhibit thereto. Filed January 30, 1940. Term Nos. 682, O. T., 1939, 683, O. T., 1939.